Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 48.

JAMES M. SIGAFUS,
Plaintiff in Error,

vs.

DUDLEY PORTER *et al.*,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

Statement of the Case.

For greater convenience, we shall continue on this argument the same designation of the parties in the court below.

The action below was for damages, for deceit by the defendant, inducing the purchase of the Good Hope mine, by the plaintiffs.

The defense, from the outset, have misapprehended our contention as to the relation to the entire transaction of William H. Griffith, insisting that we counted on establishing the position that Griffith was defendant's agent.

We have never rested on that position, though we say it is abundantly sustained by the evidence. Our position from the outset has been (Complaint, fols. 14, 15) that "negotiations were entered into through Griffith," and that during these negotiations, and before the completion of the sale, that completion being directly between the plaintiffs and defendant, the defendant committed, and repeated, the deceits in question.

The deceit alleged consisted in a most ingenious and comprehensive scheme of falsification, framed, and in its different stages executed, by the defendant himself, or his immediate subordinates, comprising three main features:

1. *Falsification of the Mine itself.*

This falsification of the mine continued during a period of three years. It involved the expenditure of large amounts of labor and money. Its final purpose was the deception of any examining experts, so as to lead them to a corroboration of the marvellous statements contained in the so-called "Burnham Report," as to the quantity and quality of the ore. The method used to accomplish the purpose was, to work the mine in such a manner as to leave a large body of ore uncovered, and at the same time conceal all the barren spaces, which were many and large. This was done by excavating the mine at different levels, in different directions, until the excavations reached rich ore; by stopping the excavation where rich ore was reached; and by concealing the barren tracts by timbering, or by filling in, where timbering would not suffice.

The final result, intended and accomplished, was to make it an impossibility, for any ordinary examination, by experts of ordinary skill, to ascertan the real quality of the mine; and especially to make it an impossibility to detect the falsity of the statements in the "Burnham Report" as to the mine's past product, past expenditure, and present condition.

2. *Fabrication of the "Burnham Report."*

This so-called "Report," which was concocted by the defendant himself, contained divers statements as to the continuousness of the ore vein, its width, the actual past product of ore, the actual cost of past production, and the actual amount of ore then "in reserve" and "in sight" in the mine.

Taken by itself, this so-called "report" would have been comparatively harmless. No prudent purchaser would have acted on it, without a verification of its statements. The purpose in its concoction was two-fold: first, by means of its statements of immense quantities of very rich ore, to induce purchasers to make an examination; and second, by means of the previous falsification of the mine, and the subsequent falsification of the expert examination, to secure a corroboration by the examining expert of the statements in the Report.

3. *Deceit of the examining expert.*

This was to be accomplished in two ways: First, by the previous falsification of the mine itself; and second, by falsification of the mill run, that is, the test made by the expert of ore taken from the mine, supposed by him to be taken honestly from all parts of the mine, and run through the mill, during his presence.

This last falsification was by the defendant himself, and by one Cheatham, his superintendent. The falsification of the mill run consisted, first, in the falsification of the number of cars of ore hoisted for the mill run from the mine, that is, falsification of the quantity of the ore tested; second, falsification of the ore so hoisted, by putting in the cars, as they were sent up, the contents of bags of unusually rich ore, which had been

taken from the mine at different times during the three years of preparation; third, by the putting in the mill, while the ore was running through it, of additional specimens of gold ore of great richness. The falsification of the mill run, therefore, was two-fold of quality, and quantity. The falsification of the quantity, by falsifying the number of cars, and by the sending up of the sacks of rich ore, was by the superintendent, Cheatham. The putting in the mill of rich specimens was by the defendant, with his own hand.

The entire combination—of the three features of the scheme—worked in this way: The so-called "Burnham Report," with its marvellous statements, as to the continuousness of the ore vein, its great width, the absence of barren spaces, the large quantities of ore got out in the past, the slight cost of extracting and milling the ore, and the large masses of ore still "in reserve" and "in sight," acted as a bait, as the inducement—to an examination. Afterwards, when the examination came, then the large width of the vein throughout all the surface then left open to examination, the absence of barren spaces, and the great richness of the ore at every accessible point, could not fail to lead the expert, from his own examination, to believe in the accuracy of the statements of the Burnham Report. To ensure still greater certainty, however, that the expert should be convinced of the accuracy of those statements, the defendant made a still further falsification, of the mill run, in the manner before stated.

It is easily seen, that the skillful execution of this entire scheme (and the execution was with remarkable skill) would make detection of the fraud, through any ordinary examination, by any ordinary process, a virtual impossibility. Wherever the expert turned, he found gold, in ore of great richness. The barren spaces, which in fact were many and long, were skillfully concealed, so that they could be discovered only by long continued operation of the mine; by precisely such operation, as did finally result in the discovery of

the fraud by the plaintiffs after their purchase. Any conclusion other than that the statements in the Burnham Report were accurate, was beyond any reasonable possibilities of any ordinary expert examination. The result of any such examination, under ordinary methods, was a foregone conclusion.

Such was the fraud in its entire combination.

Its chief essential feature, however, was the fabricated Burnham Report, with its detailed statements of actual production, and actual expenditure in the past, and actual tonnage of "ore in reserve" and "ore in sight." This Burnham Report was the central feature of the fraud.

The Evidence.

I.—As to the falsification of the mine.

The evidence on this part is the testimony of Doran the defendant's superintendent during the three years' work of preparation; of Egan, the expert, on whose examination the plaintiffs made their purchase, who discovered the concealed barren spaces; of Kingsbury, one of the miners who laid aside the sacks of rich ore for subsequent use in the examination; and finally, and chiefly, the cross-examination of the defendant himself, and his letters.

Doran testified that he conducted the work of the mine for about three years; that he excavated the mine at different levels, and for long distances; that the excavations on each level were pushed till they reached rich ore; that at those points the excavations were stopped; that large barren spaces were concealed, by timbers and filling in; and that all this was by defendant's own direction.

Especially Doran testified to two long stretches of barren space, one at the north end, and the other at the

south end, of the second level, one 80 feet in length and the other 150.

Egan also testified to the fact of a sketch map being drawn by the defendant himself at the time of his examination, which represented the excavations as stopping at these barren spaces. He also testified that these barren spaces were concealed at the time of his examination; and that they were discovered, only after he began operating the mine, after its purchase by the plaintiffs.

Kingsbury testified that during the three years of the preparation, he had laid aside sacks of very rich ore, and that that was the rich ore sent up during the mill run, by direction of Cheatham, the then superintendent.

Testimony of Doran, fols. 77-83.
do do fols. 66.
do Egan, fols. 85-91.
do Kingsbury, fols. 128-132.
do Defendant, fols. 946-977.

The defendant on cross-examination conclusively established the falsity of the defence, and the accuracy of our charges, at every point. But as to this point of the three years' preparation, by means of a systematic scheme of the exposure of rich ore, and the concealment of barren tracts, the defendant, after giving a wholesale denial of his connection with any such scheme, on being confronted with his own letters to Doran, made a complete collapse. He began with a profession of complete ignorance as to the existence of any such treatment. He ended with a confession.

Cross-examination defendant, Appendix A.

The cross-examination on this point not only conclusively established the defendant's guilt, but it finally destroyed his character as a witness—by showing his entire readiness to testify under oath to anything which he thought would serve his ends.

II.—As to the Burnham Report.

On this branch of the case, it will be found that the evidence to support our charge of deliberate falsification, by the defendant, reaches the completeness of mathematical demonstration.

Here, too, the plaintiffs' charges were substantiated, mainly, by the forced confession of the defendant himself.

The record contains two copies of this Burnham Report, in vastly different form. The one delivered to Egan, on which he made his examination, and on which the plaintiffs made their purchase, appears at fols. 1415-1473, and is marked Plaintiffs' Exhibit A.

The other was discovered in the possession of the defendant on his cross-examination; and was put in evidence by the plaintiffs at fols. 1615-1655 as Plaintiffs' Exhibit 33.

Of these two copies, the copy furnished to Egan (Plffs'. Exhibit A), and submitted to the plaintiffs, turned out to be a falsified later edition of Exhibit 33, by the bodily incorporation in Exhibit 33 of entire new pages of figures, and of entire paragraphs of statements of alleged facts wholly without foundation, made by the defendant himself, or his amanuensis, Bird.

The evidence established the following specific facts:

1. That the copy of the so-called Burnham Report (marked Plaintiffs' Exhibit A) which Egan used on his examination, and on which the plaintiffs made their purchase, came from the hands of the defendant. It was identified by Doran, as the copy delivered by him to the defendant to be mailed to Griffith; by Griffith as the copy received by him from defendant; and by Egan as the copy by him received from Griffith, through Col. Platt, and in his possession at the mine at the time of his examination.

The defendant himself finally admitted its identity, and its origin.

Testimony of Doran, fols. 94-98.
" Egan, fols. 219-220.
" Egan, fol. 355.
" Griffith, fols. 548, 549.
" Defendant, fol. 987.

2. The statements in the report, concerning the continuousness of the ore vein, the absence of barren spaces, the width of the " pay streak," the quantity and richness of past product, the actual cost of that product, the average ore value per ton of that past product, and the amount of the ore then " in reserve " and " in sight " are as follows:

At fol. 1426, the statement is:

" The quartz on all dumps assayed from a trace to $50 per ton, the same holds good of south and surface openings. *The conclusions reached are that at no place on the vein so far opened are there long stretches of barren ground—the extreme distances sampled being 3,300 feet apart.*"

At fol. 1439, the statement is:

" Now, as connection has been made with the south workings, and it is clearly proven to be *one continuous vein,* and as the surface cuts and shafts show its *continuity to the old workings north, and thoroughly explored, block by block, for a distance of 900 feet, places the ore in sight to at least the depth of present workings, and from the old workings of San Jacinto to the old workings of Good Hope, less the ore in reserve, gives a block 640 x 360 feet equal to 37,333 tons.*

" At $18 per ton, equal to.....$671,994.00
Total in sight $80,100 and
$671,994..... .... 761,094.00

"The drifts north are both being driven, and, on widening pay-streaks, between well defined walls. *In a few months this entire block, now figured as being in sight can be placed as ore reserve.*"

At fol. 1433, the statement is:

"These numerous measurements show that the pay [pay streak] is very even and *continuous through the entire mine.*"

Thereafter were given detailed statements, as to "ore in reserve," "ore in sight," actual past product, actual bullion returns, and actual expenditures, which statements appear in Appendix B.

The report ends with the following summary:
Fol. 1473.

"SUMMARY.

Length of ore shoot	3,300 feet.
Lowest depth attained	416 feet.
Number of feet developed	3,000 feet.
Width of fissure	4 to 10 feet.
Width of pay streak	Average of 2 feet.
Tonnage in reserve	44,733.
Net value in reserves	$805,186.
Tonnage in sight	37,333 tons.
Net value in sight	$761,094.
Average of all ore milled per ton	$23.78.
Number of tons milled	2,434.
Bullion produced in the past 12 months	$57,879.78.
Total expense	$15,509.
Estimate total *bullion produced*	$317,879.78."

The meaning of these statements as to "ore in reserve" and "ore in sight" is thus given by Egan: "By ore in sight is meant ore that has been measured and sampled on one or two sides. * * * Ore in

reserve is ore that is blocked out and that can be measured and sampled on all or nearly all sides."

Testimony of Egan, fol. 236.

See extract from Burnham Report, Exhibit A, in Appendix B.

3. The falsity of these statements is established as follows:

(*a.*) As to the existence of long barren spaces.

Testimony Doran, fols. 81, 83, 89, 90.
Testimony Egan, fols. 234, 235.
Testimony of Foster, fols. 432-434.
Testimony Smith, defendant's expert witness, fols. 1234, 1235.

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(*b.*) As to quantity of past product.

Whereas the Burnham Report states the past prod-

uct to be $317,879.78, the defendant on his cross-examination admitted, that all the bullion from the mine had gone to his own bank, the Chemical Bank, in the City of New York. He was finally compelled to produce the mint returns for the entire period of his ownership. The mint returns which he produced were then compared with the figures stated for the mint returns in the Burnham report; and the fact was then admitted, that of $51,880, the amount so stated in the Burnham report, $33,054 was a pure fabrication.

This left only $17,826 as the value of the gold shown by the bullion returns, that is, of bullion resting on any evidence, which came from any source connected with the defendant—this mine or any other. For the defendant owned more than one mine; and no evidence was given by him to show what part of his entire bullion product came from the mine in question, or what came from other mines owned by him. The defendant was then challenged to explain these figures in the Burnham Report, and his cross-examination took this form (fols. 991, 992):

> "Q. Can you explain to the jury how it happens to be that a report made in 1891, [the date he had given for the report] early in the year, contained a statement as to the output of your mine *down to February, 1892?*
>
> "A. *It did not.*
>
> "Q. *How did it get there,* then?
>
> "A. It is *like lots of those other statements, that $317,000, that nobody ever heard of, only you,* OR THE MAN THAT PUT THEM THERE."

As to who was "the man who put them there," the later statement of the evidence will leave no doubt.

The point here made, however. is that the defendant, in an incautious moment, admitted that this figure of $317,879.78 was wholly without any foundation in fact; that it was a mere fabrication—by some one.

The entire total of the mint returns for the past pro-

duct of the mine from March, 1890, to December, 1893, was $61,590.50.

Defendant's Exhibit G., fols. 1678-1680.

(*c.*) As to quality of the past product.

The statements in the Report are all based on the alleged mint returns, incorporated bodily in that Report at fols. 1435-1437, page 479.

As to these mint returns, as has just been stated, defendant's cross-examination developed the most extraordinary fact, that these returns, so far as concerned the Good Hope mine, were absolute fabrications, by the defendant, or his bookkeeper, his son-in-law, J. Everett Bird.

The evidence of this fabrication was as follows:

The defendant was confronted with written copies, or statements, purporting to be mint returns of another mine, the Homestake, which was owned mainly by defendant and Mr. and Mrs. Bird, Mrs. Bird being defendant's daughter. Those papers were in Bird's handwriting. With that handwriting, of course, defendant was thoroughly familiar. The defendant in his cross-examination on this point began by professing his complete ignorance even of the handwriting. He ended with another confession that *these mint returns of another mine*, if indeed they had any genuineness whatever, *had been incorporated bodily in this so-called Burnham Report on the Good Hope.* Thereupon followed one of the most remarkable statements, by the Court, of an admitted wilful falsification, in which the counsel for the defense acquiesced.

We ask the Court to read the following extract from defendant's cross-examination on this point. It is virtually conclusive, as to the main issues of fact in this case.

Fols. 998-1022.

"Q. Now, I show you the copy of this Burnham report, which has been previously identi-

fied as the one received by Mr. Griffith from you. You will notice there is an entire sheet in that one containing the alleged returns of gold bullion from the United States Assay Office to the Good Hope Consolidated Gold Mines. You notice that sheet, do you?

"A. Yes, sir.

"Q. That is a separate sheet. Is there any such sheet in that one? [This referred to the other copy, Plaintiff's Exhibit 33.]

"A. No, sir.

"Q. Where did that sheet come from?

"A. I couldn't tell.

"Q. No knowledge, information or belief?

"A. No, sir.

"Q. *In whose handwriting are those papers that I show you now?* (Handing witness papers.)

"A. *I don't know.*

"Q. Whose handwriting do they resemble?

"A. *They resemble Bird's handwriting.*

"Q. You notice the heading, 'Return of gold bullion from the United States Assay Office to the *North Homestake* Mining Company, *White Oaks, New Mexico?*

A. Yes.

"Q. That was a *mine owned by you*, was it not?

"A. Yes, sir.

"Q. And that printed heading is at the top of each of those bullion returns, is it not?

"A. Yes.

"Q. Is that regular paper that belonged to you and was used by you in the business of that mine?"

"MR. WETMORE: I don't quite see the relevancy of this. Here is a matter with some other mine.

"MR. STICKNEY: Oh, no. These three sets of figures appear in that Burnham report as the returns of the Good Hope Mine, and it is another mine of this defendant, and here

they are in Bird's handwriting without a doubt, and we shall prove that the figures are put right in here as the figures of the Good Hope Mine.

"MR. WETMORE: I object, upon the ground that there is no connection proved with this defendant, or the cause of action set forth. Apparently he wishes to prove that this is in the handwriting of Mr. Bird, and are returns from the North Homestake Mining Company, in which Mr. Sigafus had an interest, and, Mr. Stickney, that these returns correspond.

MR. STICKNEY: Those returns, which are on this defendant's own paper——

"MR. WETMORE: It is not on the defendant's own paper.

"MR. STICKNEY: Oh, yes. Then they appear stated in this Burnham report, which comes from him as the figures of the Good Hope Mine.

"THE COURT: What period do they cover?

"MR. STICKNEY: For the month of January, 1892; the first one bears date February, 1892. Then, in the table underneath the figures, the return is February 1st.

"THE COURT: Can't you give me the entire period covered?

"MR. STICKNEY: One is January 10th, 1892, one February 10th, 1892, and one December 10th, 1891, so that we have the three last months of the period alleged to be covered by the sheet that is included in the Burnham report.

"Q. During the month of December, 1891, January, 1892, and February, 1892, were you the owner of the North Homestake Mining Company at White Oaks, New Mexico?

"A. I owned a one-sixth interest in it.

"Q. Who owned the rest of it?

"A. Dr. Hunter owned two-sixths, J. Everett Bird owned one-sixth, and his wife two-sixths.

"Q. Was this the paper used for the return of that mine, to your best recollection and belief?

"A. *I don't know.*

"Q. Did you ever see a paper of that sort before?

"A. *I might.*

"Q. Where did you see it?

"A. *I don't know.*

"By the Court:

"Q. Haven't you any knowledge yourself about the mint returns of that mine during the period covered by these reports?

"A. *It was all sent to the Chemical Bank in New York.*

"By Mr. Stickney:

"Q. *And that is your bank, isn't it?*

A. *Yes, sir.*

"Q. *And this bullion was sent to your own bank?*

"By the Court:

"Q. You probably took interest enough in the matter to know what the mint reports were that were coming from your Homestake mine?

"A. *Those are not mint reports.*

"Q. *What are they?*

"A. *I don't know.* They are a copy of some paper or other. *They are not mint returns.* I have got all of them—200 or 300 of them.

"Q. *Don't they purport to be copies of the mint returns?*

"A. *I don't know what he claims them to be.* I never saw them. I never saw any paper of that description or that character.

"By Mr. Stickney:

"Q. Never saw any paper of that description or character?

"A. No, sir.

"Q. Are you watching your words?

"A. *I am watching them, yes, sir. The mint receipts are all here, and I can produce them.*

"Q. Produce them?

"A. I cannot to-day.

"Q. Produce them now?

"A. I cannot.

"Q. You just said they were all here.

"A. *They are here in New York, in this city.*

"Q. Where is Mr. Bird?

"A. He is at home, I suppose.

.. Q. Where is his home?

"A. 96th street.

"Q. In this city?

"A. Yes, sir.

"Q. When did you last see him?

"A. Sunday.

"Q. Is he attending here, has he been in attendance here for the purpose of testifying?

"Q. No, sir.

"Q. Do you intend to produce him to testify?

"A. *I don't know.*

"Q. Where is it that the mint returns which you say you have in your possession or custody somewhere of the North Homestake property, now are?

"A. I can get them.

"Q. *Where are they?*

"A. *I don't know.*

"Q. *How do you know you can get them if you don't know where they are?*

"A. I will take the chances on that.

"Q. And have you no knowledge where they are now, at this moment?

"A. No, sir.

"Q. Where did you last see them?

"A. *I have not seen them in two years.*

"Q. Where did you last see them? I did not ask you when?

"A. *In California.*

"Q. And you have never had them with you here in New York?

"A. *No, sir.*

"THE COURT: *Mr. Stickney, don't pursue that.* I wish you would just show him the

Burnham report annexed to Col. Egan's deposition and ask him if there were any such returns as purports to be in that report for the mining property in question.

"Q. Now, I show you again this sheet containing the return of the gold bullion from the United States Assay Office to the Good Hope Consolidated Gold Mines, and I ask you to produce now the returns of gold bullion for the Good Hope Consolidated Gold Mine, covering the period from March 4, 1890, to and including February 1, 1892? Produce them, please. Did you hear my question?

"MR. WETMORE: We will produce them.

"Q. Were there any returns for the Good Hope Mine, genuine ones, that agree in dates and figures with those that are set forward on that sheet?

"A. *Some of them.*

"Q. And *that is all you will say? How many?*

"A. I can tell you if I look at them.

"Q. Tell me exactly?

"A. *Here are two;* they are duplicates; *they are inserted twice.*

"Q. What?

"A. Here is May 17th, 1891, 127 ounces and seventy-two one-hundredths, and here is inserted——

"BY THE COURT:

"Q. *Those are genuine?*

"A. *They are inserted twice.*

"BY MR. STICKNEY:

"Q. That is not what we are trying to get. What we want you to point out, if you can, is whether *any that purport to be returns from the Good Hope Mine represent the actual returns of that mine?*

"A. *They are cut up so*——

"MR. WETMORE: If your Honor please, Mr.

Johnson has checked off on the mining receipts that we have—whether they are the whole mining receipts or not I do not know—those that do not appear in the mining receipts—which is the question that Mr. Stickney is asking.

"MR. STICKNEY (to the witness): These (Plff's. Ex. 34) are the ones then given by your counsel *which do not appear vouched for by actual receipts.* Will you adopt that?

"THE WITNESS: I don't know what that is.

"MR. WETMORE: *We will admit that.*

"THE COURT: Well, it is stated by counsel.

"Q. *Your counsel now presents a statement of bullion receipts, of figures of bullion receipts, given in the Burnham report for which you do not have mint returns in that period. 1891,* and the first two months in 1892, and they foot up *$33,054.18.* Now will you be kind enough to give us the mint returns, *the genuine receipts which you do have in that period?* You probably have some statement of them.

"THE COURT: Give me the amount, Mr. Stickney, of that.

"MR. STICKNEY: $33,054.18. Those are the *ones for which they do not have genuine returns.*

"THE COURT: Now, what is the total amount of the returns in this Burnham report?

"MR. WETMORE: That figures up *$51,880.*

"Q. Now, give us the original returns which you do have for that period?

"MR. WETMORE: There they are (producing paper).

"Q. These cover way back in 1890, and a big period, don't they?

"A. Three in 1890, I think.

"MR. WETMORE: They commence March 4, 1890.

"THE COURT: *Then, we must assume it to be a fact in the case, unless changed hereafter* by the evidence, that as stated in the Burnham report, $51,880 is the true return——

"MR. STICKNEY: No.

"THE COURT: No, I see.

"MR. STICKNEY: That $33,054 is the false; that is the item which is put in there without any voucher for it.

"THE COURT: *$33,054 of the $51,800 are fabricated?*

"MR. STICKNEY: That is it, your Honor. Coupled with that, your Honor will bear in mind the statement in the summary of the report that 2,434 tons in that period produced $57,700 in bullion.

"Q. Have you got any statement already prepared of the exact bulletin returns for that period of the Good Hope Mine?

"A. They are there.

"Q. Oh, no. I know the original returns are there, but have you any statement among your papers, a table showing the exact bullion returns for that period?

"A. No, sir.

"Q. Don't you know that those bullion returns for that period correspond exactly with the entries from the Wells Fargo books that we put in evidence here?

"A. No, sir.

"Q. Will you please take my question instead of continually going back and pointing to these?

"MR. STICKNEY: I shall have to put some questions over again.

"THE COURT: *I wouldn't spend any time. I don't wish to dictate, but there are some things that seem to be clear.*

"MR. STICKNEY: I will take your Honor's suggestion, most readily.

"Q. You have already stated that Mr. Bird did keep some books and papers?

"A. I suppose he did, yes.

"Q. Won't you raise your voice? *Do you intend these gentlemen to hear you or not?*

"THE COURT: Try to raise your voice.

You can if you will. It is a matter of some interest to you and if your testimony is to be of any value at all it must be heard.

"Q. *From what source were the figures in the Burnham report taken as to your expenditures?*

"A. *I know nothing about the expenditures, nothing whatever.*

"Q. *Do you know of any source from which they were taken except statements made by Bird in some form?*

"A. *No, sir; I know of no source from which they were taken.*

"Q. *Do you know of any source for either of those sets of items in the Burnham report except Mr. Bird and yourself, and your books and papers?*

"A. *No, I don't know of any.*"

We respectfully submit, that this extract from the testimony of the defendant goes far towards finally establishing *some* of the issues in the case.

(*d.*) As to expense of past production.

In view of these last positions, the figures in the Brunham Report must be assumed to be false, in the absence of any attempt by the defense to establish them by credible evidence; and especially in view of their omission to examine Bird, the keeper of the accounts, in connection with the accounts.

The defendant admitted (fols. 1008, 1009) that Bird was in the City of New York at the time of the trial.

(*e.*) Quantity of "ore in reserve."

As to the figures of "ore in reserve" the defendant made a similar confession, to the effect that the figures in Exhibit A had been raised by thousands of tons, to his knowledge, from the earlier figures in Exhibit 33.

Cross-Examination of defendant, fols. 1030-1032.

But these figures of "ore in reserve" are shown by defendant's cross-examination to be a pure fabrication. By that we do not mean that there was no "ore in reserve" whatever. But these particular figures in the Burnham Report were a pure fabrication, with no pretense of a justification in fact.

The evidence on that point is as follows:

The defendant admitted at fols. 1078-1082, that there had been several editions, "batches," he called them, of the Burnham Report.

A comparison of the two editions of the Report shows that these figures of the tons of both ore in reserve and "ore in sight" were a mere bodily incorporation in Exhibit A of new figures, none of which appeared in the former edition, the accuracy of which the defense made no attempt to prove.

The *editio princeps* of the Burnham Report, that is the first edition appearing in any known historical records, Plaintiffs' Exhibit 33, gives a detailed statement, block by block, of the entire tonnage of ore already measured and sampled, without, however, distinguishing between "ore in sight" and "ore in reserve." That tonnage was given as follows (fols. 1634-1642, summarized at fol. 1654):

	Tons.
Block 1	8,741.2.
do 2	5,012.
do 3	3,228.2.
do 4	1,355.2.
do 5	2,036.
Total Tonnage	20,372.6.

The Court will note the scrupulous regard for the most veracious accuracy evidenced by the decimals.

The tonnage in the last edition (Plffs.' Exh. 33), 44,733 tons of ore "in reserve" and 37,333 tons of ore "in sight," amounts to 82,066 tons.

In other words, there was a mere addition of 62,000 tons.

(*f.*) Quantity of "ore in sight."

The statement in the Burnham Report on this point is 37,333 tons.

As to this figure, given in the latest edition of the Burnham Report, the entire tonnage stated in the earlier edition (Plffs.' Exhibit 33), comprising both "ore in sight" and "ore in reserve" is only 20,372.06 tons (fols. 1654, 1655), so that we have, on this one point alone, on the defendant's showing, a pure fabrication of 16,960 tons.

The utter falsity of the Burnham Report, therefore, is fully established as to these essential particulars:

(*a.*) Continuousness of ore vein, and absence of barren spaces.

(*b.*) Quantity of past product.

(*c.*) Quality, or ore value, of past product.

(*d.*) Expense of past production.

(*e.*) Quantity of "ore in reserve."

(*f.*) Quantity of "ore in sight."

4. The falsity of the statements in the Burnham Report being thus established, we proceed to consider the question of its authorship.

On this point, no conclusion is possible except the authorship of the defendant. By this is not meant, that the defendant actually drafted the report in his own handwriting. What is meant is, that though the hand may have been the hand of Bird, the real author was Sigafus.

Let us see what is the condition of the evidence on this point.

It is confessed, that Bird was defendant's son in law, and part owner of both the Homestake and the Good Hope mines; that he executed with the defendant the contracts with Griffith; that he kept the books and accounts of both mines; that the fabricated mint returns, which belonged to the Homestake mine, if we assume that they had any genuineness whatever, were in Bird's handwriting; that those fabricated returns were incorporated bodily in the Burnham Report, the latest revised edition; and that of those fabricated so-called mint returns $33,054 were a pure invention, having no veritable origin, as to either of the two mines, or as to any mine whatever.

It is then confessed, that this latest revised edition was delivered to Griffith by Sigafus.

The defense, then, omit to call Bird as a witness.

In addition, as the last piece of evidence on this point, we have the statement in defendant's own letter to Doran of June 11th, 1891, in these words: "That will make this lower drift about 900 to measure, which will then give me *more than twice the measurements we had made by Mr. Burnham.*

Cross-Examination defendant, fol. 1026.

The defendant, after the numerous falsifications in this evidence, was confronted with this statement in his letter, and was challenged to explain it with the following result:

Folios 1025 to 1029:

"Q. You have said already that you did not have anything to do with Mr. Burnham's examination?

"A. I was not there. I had nothing to do with it whatever.

"Q. I show you a letter dated June 11th, 1891, addressed to Doran. Who wrote that (handing witness a paper)?

"A. I did.

"Q. I call your attention to this clause in it, about 12 lines from the beginning: 'That will make this lower drift about 900 to measure, which will then give me more than twice the measurements *we had made by Mr. Burnham.*' Is that in your handwriting in that letter?

"A. Yes, sir.

"Q. Do you wish to repeat your statement now that you had nothing to do with Burnham's examination or measurements?

"A. *I wish to explain it.*

"Q. Do you wish to repeat your statement?

"A. *I don't know what you mean by that.*

"Q. You don't know what I mean?

"A. *No.*

"Q. Now, *make any explanation you like.*

"A. *By driving it twice the distance we had double the amount of tonnage overhead.* That is all.

"Q. And that is all the *explanation* you have to make of your expression when you speak of measurements, '*we had made by Mr. Burnham*'?

"A. Yes, sir."

We ask the Court, at this point, to read the extracts from defendant's cross-examination as to the Burnham Report, contained in Appendix C.

In the face of all this evidence, we respectfully submit that, if this question of authority arose on the trial of our indictment, the authorship of the defendant could not be said to involve a "reasonable doubt." Men suffer capital punishment on weaker evidence than that.

The position of the defendant's counsel on this argument as to the Burnham Report, we most respectfully submit, rises to one of grotesque humor. They say, at page 136, with all apparent gravity, that "the *failure* of plaintiff's counsel to *ask Egan* whether he had *shown the paper* Exhibit A *to Sigafus* (*there being several papers going by the name* of the Burnham Report) is

significant, for *without such evidence no identification was possible.*" We must be permitted to say, that this position of our learned opponets, in the face of the presentation of that precise paper to the defendant on the trial, and his admission that it came from him, causes surprise.

For some inconceivable reason, they seem wholly to ignore the evidence of their own client. His evidence, we should concede, in entitled to no weight whatever, for the purpose of establishing any fact in his favor. But what are we to say of the compulsory confessions, wrung from him on cross-examination? That is a feature of this case with which our learned opponents have made no attempt to grapple.

After this overwhelming accumulation of evidence, made wholly free from any possibility of doubt by the cross-examination of the defendant, demonstrating these facts, (1) The falsity of the Burnham Report; (2) defendant's knowledge of that falsity; and (3) his authorship of the falsifications, it will possibly appear to the Court, that it would be a work of supererogation, if we were to spend time on the subsidiary questions, of the defendant's intent in issuing the report, or the materiality of the statements in the report contained.

III.—The falsification of Egan's expert examination.

At the outset, we call the attention of the Court to the fact, testified to by Egan, evidenced by his correspondence, and conclusively established by the circumstances of the case, that Egan's chief purpose, as would have been the case with any examining expert, was to ascertain whether or not the statements of the Burnham Report were accurate. Egan did not believe that they were; or that they could be. If they were, however, here was a property of marvellous value. To use his own expression, here was a mine "made to order," (fol. 1553). So, in fact, it was; made to the order of Mr. Sigafus. This, then, was the primary purpose of Egan's

examination—the verification of the Burnham Report.

The fundamental feature, the backbone, of the defendant's fraud in relation to the examination, especially in connection with the Burnham Report, consisted in the three years preparation, which had made the result of the examination a foregone conclusion. It was this three years preparation which made the detection of the falsity of the statements in the report a virtual impossibility.

As to the fact of preparation, of what might be termed mineral forgery, the evidence has already been stated.

As to the next point, however, the falsification by the defendant of Egan's mill run, as to both quantity and quality of the ore raised from the mine, and run through the mill, the facts are proved by the testimony of Egan himself, of Jepson, who worked the mill; of Cocking, who testifies to the fraudulent alteration of the tally by Cheatham; but finally, by the cross-examination of Cheatham, who made almost as triumphant a success as a witness for the other side as the defendant himself. Mr. Cheatham, after demonstrating his entire willingness to testify to anything and everything which could serve his immediate purpose, was confronted with a statement in writing, over his own signature, which was a complete confession of his own part in the fraud, and of the fact, which needed no corroboration from him, that whatever he had done was done by the direction of the defendant.

Testimony of Egan, fols. 227, 228, 242-246.
do do Cocking, fols. 156-168.
do do Kingsbury, fols. 129-136.
Cross-examination of Cheatham, fols. 811-828, 834-848, 852-855, 867-873.

Cheatham's confession appears at fols. 857-867, and reads as follows:

Extract from testimony of JAMES R. CHEATHAM, folios 857 to 873:

"Q. Now I will read you this statement:

'Whatever I did when Mr. Egan examined the mine, *I did under Mr. Sigafus's instructions*, excepting a few which he did not say anything about. There was some ore in sacks in first level, in stope near second manway, north of main shaft; there was about fifteen sacks more or less. They were there when the mill run of Egan was started. I think I know who mined it, but would not say for certain. I think it was Kingsbury who mined it. I was told by Kingsbury that it was rich ore. I saw part of the ore myself. It looked like rich ore; it looked good. I only saw the top of the sacks. *I should judge it would go $40 easy*, and how much more I would not pretend to say. While the mill run was being made, *I told Manuel Miller to put it* into the chute, and while the mill run was being made I told some car man, I think Cocking, to *send it up so that it would go into the mill*, and *he did so, the car man, whoever it was. That was done for the purpose of getting the mill run. Sigafus told me to send it up into the mill and that was the reason why I did it.* Now, that car man was supposed to keep a tally of his car loads on a board with a pencil. The pencil was hung on the board; the board hung there. The man at the hoist had a tally of the cars also, which he kept on a card. Boren, who was the car man in the second level, he had a tally which he kept on a board. He was sending up cars also. The other car man was on the first level. There may have been a few car loads of ore which were sent up during the mill test, *which did not get on the tally boards, or which got on and were not reckoned. What I mean is, that if there was any mistake or descrepancy between the tally boards, the mine got the benefit of it every time, but I know that I did not deliberately take off from the tally boards any car loads that I was certain*

went up. The bulk of the ore that was sent up for the mill run from the second level was taken from the south of the main shaft and the bulk of the ore from the first level was sent up from north of the main shaft. The majority of the ore put into the mill during the mill test came from the richest parts of the mine. We got some ore from all over the mine, *but the majority of the ore came from the richest parts of the mine, and the ore that was sent up was a good deal better than the average of the mine.*

In sending up superior ore, I only followed his instructions; I mean the instructions of Sigafus. He told me to send up the best ore. Mr. Egan's instructions to me was to send up the average ore from all over the mine, but Mr. Sigafus's instructions were otherwise. The mill run was day times for about three days. I saw the amalgam after the mill run. *In my opinion it was very much richer than the ore we accounted for.* In my own mind, *I thought some one had put very rich ore or amalgam into it.* I didn't put it in. *Mr. Sigafus told me that he was very much afraid the mill run would not run high enough. He said that he wanted it to run thirty dollars. The second level* north of the main shaft had been drifted further than it showed when Egan examined the mine. *It was barren ground, and had been filled up and closed up so it didn't show.* Wilford was working in a raise near it when I was there. The second level south of the main shaft had been drifted into before Egan examined the mine. There was nothing that amounted to anything there, *and it was closed up.* I was mine boss at the time Egan examined the mine. At the end of the mill run, Sigafus said, that he didn't clean up all the amalgam that there was in the mill, and said in substance, or used words that conveyed that impression, *that he was afraid it would show up too rich. I knew the mill run showed up higher than the ore would average.*

I went to work on the Good Hope mine in July,

1890. They got out a good deal of ore in 1890 and piled it all up until they put in the Bryan mill, February, 1891. They did not mill any of it until the Bryan mill was put up. It was a good many hundred tons of good ore; *about $8 ore.* I will not undertake to say how many hundred tons. When the Bryan mill was put up they milled this ore, and also ore they took out in 1892. 'J. R. C.'

The Bryan mill on soft ore would run a ton an hour, but, in my opinion, in 1891 and 1892, the mill, as run, did not average to run over 12 tons a day. Before Egan made his mill run, a mill run had been made by some one who was sent there by some one who talked of buying. *I understood those fellows came here and wanted a mill run, and we gave them one, but they didn't buy it. We gave them a very good mill run.* Sigafus often told me that he had some very rich samples from the White Oaks. There were big gold nuggets in some of it he showed to me. While the mill test was being made there was nothing to prevent anyone from salting the mill run. The mill man did the firing and tended to the mill, and it was an easy thing for any one to salt the mill at any time, even if the mill man was right there. The mill when grinding made so much noise that one wouldn't notice a person walking overhead in the crushing room. Some time in 1892 and 1893 I left the Good Hope mine for two or three months. When I came back, I noticed what I thought to be gold concentrates from the Good Hope mine had in my opinion been squirted on the face of the vein. I knew it was put there by artificial means, but I don't know who did, or why it was done. But I could guess. I scraped it off, some of it, and looked at it. I judged that it was gold concentrates. I had seen gold concentrates before, but never in an ore body. On the north side of the first level, close to the shaft, there was a big body of low grade ore, and there was lots of what I took to be concentrates in it. An Englishman was here and saw it

some six months before, while I worked at the mine; there were a good many people who talked of buying it. Sigafus never had a surveyor in the mine while I was there. *Mr. Jones read this over to me, and made the corrections which I suggested. It is all right, and I am ready to stand by this statement. It was made by me without any inducement in answer to his questions, the 18th day of April, 1895.*

J. R. CHEATHAM.

IV.—As to the deception of Egan, and of the plaintiffs.

This issue, like all the others, was passed on by the jury. But we must state a portion of the evidence.

Egan must have been a man of superhuman acuteness, if he had not been deceived.

We apprehend, however, that on this point, after the developments already made of this most adroit and successful scheme of fraud and falsification by wholesale, that the Court will not consume a large amount of time on this question of fact, whether or not Egan and the plaintiffs were actually deceived by these elaborate machinations of the defendant, but on this issue will readily accept the verdict of the jury.

The testimony, however, on this point, is that of Egan, his letters written at the time to Morse, one of the plaintiffs, to Col. Platt, who then expected to purchase with Morse, to Roberts, Col. Platt's secretary, with the testimony of the three plaintiffs, the purchasers.

Testimony Egan, fols. 267, 268.
do do fol. 280.
do do fols. 249-251.
do Plaintiff Morse, fols. 358, 359.
do do do fol. 362.
do do fol. 365.
Testimony Plaintiff Hobson, fols. 397, 398.
do do do fol. 401.
Testimony of Plaintiff Porter, fols. 520-524.

From the testimony of these witnesses it is clearly established, that the moving cause of the purchase was the corroboration, or the supposed corroboration, by Egan's examination of the Burnham Report.

The contention of the defense on the trial, to the effect that Egan was not the victim, but was the perpetrator, of a fraud, was absolutely unsupported by one word of evidence, was not so much as suggested on the cross-examination of Egan, and was raised for the first time on the trial, after Egan's death. It was only a forlorn hope.

On this point the Court will accept the jury's verdict.

V.—Damages.

The position here is quite simple.

If this Court follows the well established rule of law as to damages for deceit, the verdict of the jury, under a charge, which, concededly, followed that rule, will be readily accepted.

The defense, however, makes a labored attempt to show that the jury's verdict was for an amount that was excessive, and was unsupported by the evidence.

A short consideration of the most important facts bearing on this issue will show that the verdict was far within the most conservative figures.

If we consider only the single item of "ore in reserve," as stated in the Burnham Report, and as it was in fact, we shall find that this single item, throwing everything else wholly out of consideration, more than justifies the amount of the verdict. The Burnham Report stated the amount of the "ore in reserve" as 44,733 tons. The value per ton of that ore, from actual assays, as stated in the Report, was $23.78. The actual cost of mining and milling as stated in the Report was $6.37 a ton. That would give a net value per ton of $17. Those 44,733 tons of ore alone, therefore, at $17 a ton, would have netted, according to the Burnham Report, $760,461. As a fact, however, on

all the evidence, the actual average value of the ore was not more than $8 a ton at the outside, while the cost of mining and milling was as much as $11. At this point, the Court will note the distinction between the average value of the ore in the mine, and of the "ore taken out." Egan gives the value of the "ore taken out" at $10 a ton (fol. 265); and he says (fol. 261) that during his period "he took out the best in quality." Foster, his successor, gives $7 to $9 as the average of the "entire ore body of the mine" (fol. 429), giving the value of the ore "that I took out of the mine" at an average of $10 (fols. 428, 429).

Moorehead puts it at $6 or $7 (fol. 623).

Wilson, who was in charge of the accounts for nearly the entire period of plaintiff's ownership, gives the average value of the ore "taken out" at $11 to $12. Smith, the defendant's own expert, gave assays of 212 samples. Of those 212 samples he was compelled to admit that *104 were of a value less than $3 a ton*, and that 18 samples yielded *no gold at all. His samples, too, were selected by Cheatham* (fols. 1226, 1227). He was also compelled to admit that there were large barren spots, and that the ore lay in "chimneys all through this mine" (fols. 1288, 1289). He was further compelled to admit that there was one "barren spot on the first level north which is probably 150 to 200 feet long" (fol. 1235). Thereafter, when pressed to give the "most accurate statement you can of how frequently you saw barren spots there in the mine," he took refuge in a complete failure of memory (fols. 1234-1238).

The defense attempt to make a point on the fact that the values of ore extracted, in one or two single instances, were above $11 a ton, the figure stated in our question to Mr. Olcott.

Plaintiff's Exhibit 25 shows, as to one period, that the value per ton of "ore taken out" was $11.10, while the cost per ton was $10.77 (fol. 1591). For another

period, about two months, the value of "ore taken out" was $12.75, while the cost was $13.72.

This point has no force whatever, for the reason above stated that the values so given are only of the *ore taken out of the mine* and milled. Moreover, these estimates of value and cost per ton, as Pliffs.' Exhibit 25 shows, are computed on the basis of three cars to the ton (fols. 1591, 1592). Whereas, it was proved that the correct allowance should be 1,200 pounds to a car load.

Testimony of Moorehead, folio 624.
" Boicourt, " 668, 700.
" Smith, " 1300.
" Cheatham " 1176.

The average value of the entire ore body, that left in the mine, with that taken out hoisted and milled, was not more than $5 or $6; that is, much less than the cost of mining and milling.

The evidence shows, therefore, beyond a reasonable doubt, that the cost of production exceeded the value of the ore extracted—owing to the large quantity of barren ground.

The mine, therefore, was practically valueless.

That was practically the testimony of Olcott, Foster and Egan.

Testmony of Olcott,, fols. 731, 732.
" Foster, fol. 430.
" Egan, fol. 265.

If, then, we compute the plaintiff's loss with any reference whatever to the defendant's false representations, we find this situation: If the jury had discarded from the case every fact other than the "ore in reserve," and had awarded as damages only $10 a ton on the 44,733 tons of "ore in reserve" stated in the Burnham Report, the verdict would have been $447,330.

A smaller verdict than that would have had no rea-

sonable justification in the evidence, if the defendant was to be held to any responsibility whatever for his false representations. For these representations gave, as we have seen, a value to the mine of $1,377,067.

Suppose, however, we look at this question from another standpoint—that of a comparison of the price paid by the plaintiffs with the value of their purchase. Although this standpoint is not the one prescribed by the law, a short examination of the situation with reference to it may give us some valuable light.

The price paid by the plaintiffs, so far as appears by this record, was $150,000 in cash and two mortgages—one for $100,000, the other for $125,000; in all, $375,000. In other words, the plaintiffs paid $375,000 for a mine which had substantially no value whatever. For the value of any mine consists in the net surplus of product over cost of production.

From that standpoint, therefore, the verdict is far within the limits.

If the plaintiffs were simply allowed to recover what they paid for that property as the mere purchase price, they should have been awarded $375,000. But it appears in evidence, that after the purchase they paid out large amounts of money for improvements. These amounts would, of course, never have been paid had it not been for the defendant's fraud. The plaintiffs' "loss," therefore, was certainly much more than the mere purchase price. But a recovery of the mere purchase price would be more than the verdict.

If, however, the defendant is to be held responsible, to any degree whatever, for his false representations, then on any conceivable method of computation, the verdict of the jury is very far within bounds.

Upon this question as to damages, the jury had all the evidence offered by either party, especially, nothing was excluded that was offered by the defendant. There were called as witnesses nearly every person of any importance who had worked in the mine, who had actual knowledge as to the quantity and quality, of its product, and the cost of production.

The amount of the verdict, $330,275, is extremely moderate, in view of the facts which were beyond the possibility of reasonable controversy.

It is necessary to call attention to certain unfortunate inaccuracies in the Specifications of Error as stated in the brief of the counsel for the plaintiff in error. It is of course inconceivable that counsel of the standing of our opponents in this case had any intention of misleading this Court. But it is submitted that such a result is inevitable, if the statements in the brief are permitted to pass uncorrected.

The Specifications of Error referred to are those which are claimed to challenge the admissibliity of expert testimony. They are the *Third*, *Fourth*, *Tenth*, *Nineteenth*, *Twentieth* and *Twenty-third*.

If the record is examined it will be seen that, as to the testimony which is the subject of the *Fourth* specification the objection was only to its "competency" (Rec., fol. 131); as to the *Tenth* specification, the objection in the record (fols 277, 278) was only that the testimony was "incompetent, irrelevant and immaterial." There was no suggestion of any of the "grounds of the objection" which are set forth in detail at page 42 of the brief. In neither case, as the record shows, was any point made against the evidence as expert evidence.

As to the testimony which is the subject of the *Third* specification, the language of the objection was that it was "incompetent and calling for an opinion" (Rec., fol. 80). The counsel did not point out whether the objection was to the expert's qualifications, to the propriety of expert testimony on the subject, or to the sufficiency of the basis for expert opinion.

As to the *Nineteenth* and *Twentieth* specifications, the brief (pp. 50 and 52) inaccurately states as one of the grounds of objection that the hypothetical question "*assumes as facts* pure matters of opinion." The re-

cord shows that the language of the objections in that regard, was only that "it *calls for* pure matters of opinion" (Rec., fols. 727, 731, 732).

More important still, it would seem from a reading of the brief that the particular portions of the hypothetical questions, now claimed to be based on assumptions not supported by the evidence, were called to the attention of the Court. The fact is that at the trial not one word of the hypothetical question was pointed out as obnoxious to the objections now urged. The objection was taken in the most general terms, and the particularizations now advanced are undoubtedly put in their present form to meet the requirement that the objection must specify the vice in the question, complained of.

Upton v. *McLoughlin*, 105 U. S. Sup. Ct. Repts., 640. "The defendant also contends that various objections and exceptions taken by him to the admission of evidence, and to instructions to the jury, and various grounds of error stated in the motion for a new trial, raised the question referred to. It is sufficient to say, that the objections to the admission of evidence merely state that the evidence is *incompetent, immaterial and irrelevant, without suggesting the question of the Statute of Limitation;* and that the exceptions to the instructions to the jury and the grounds of error set forth in the motion for a new trial make *no allusion to that question*, nor is there any allusion to it in the record sent from the District Court. Under such circumstances, *the question cannot be raised in the Appellate Court. Mays* v. *Fritton*, 20 Wall., 414 (87 U. S., XXII., 389), and cases there cited; *Beaver* v. *Taylor*, 93 U. S., 46 (XXIII., 797); *Wheeler* v. *Sedgwick*, 94 U. S. (XXIV., 31)."

Wheeler v. *Sedgwick*, 94 U. S., 1: "The *attention* of the Court below was *not called to the particular objection now taken* to the recovery of one-half the amount shown to be due upon the account headed, 'G. M. W. Chic. and N. W. account,' to wit., that it was a joint

account of the defendant and one of the bankrupts, and that the defendant could not be sued upon it alone. This being the case, it is too late to make it now.

Duncan v. *The Francis Wright,* 105 U. S. Sup. Ct. Repts., 381. "Every bill of exceptions must state and point out distinctly the errors of which complaint is made. It ought also to show *the grounds relied on to sustain the objection presented,* so that it may appear the *Court below was properly informed as to the point to be decided.*"

As to the *Twenty-third* specification the brief (p. 55) inaccurately states the ground of the motion to strike out. The record (fol. 1349) shows that the ground of the motion was that the testimony "affords no criterion "to go to the jury and that upon his own statement in "answer to the hypothetical question put to him, the "data would not permit of an accurate answer."

Nothing whatever was said of its "being based upon "assumed misrepresentations of facts as to which rep- "resentations there was no proof," or as to its being based upon assumed facts, as to which there was no proof. *Especially nothing was said either on the motion to strike out, or in the objection to the testimony as to its "being based upon an erroneous theory as to the "measure of damages."* The statement in the brief, "all of which objections were taken first at the giving "of the testimony," which follows immediately after the phrase "an erroneous theory as to the measure of "damages," is wholly inaccurate and misleading.

The positions now urged are mainly afterthoughts.

See Opinion of Court of Appeals, pp. 624, 625, 626.

Argument on the Law.

We assume that the intention of this Court is to consider mainly the question that was certified to it by the Court below, that is, the correctness of the rule of damages, laid down in the charge of the Court to the jury. We assume that the entire record has been called for by this Court simply for the purpose of enabling it to possess itself more fully and accurately of the facts upon which the question of law as to damages arises.

At the same time, we have been compelled by the course taken by our adroit and astute opponents, to go into an examination of the entire case on the facts. They are seeking to reargue the entire case. We have been compelled—to some extent—to follow their devious course.

This attempt of our opponents to argue the entire case on the facts, and to impress the Court with the idea that the verdict was a mere "speculative" verdict, that it was against the weight of evidence, and that the damages were excessive, compels us to add, that the defense made a motion for a new trial on those very grounds before the judge who presided at the trial, that those grounds were all elaborately argued, and their motion was denied. We have had, then, in addition to the verdict of the jury, a careful consideration of all these points by the tribunal best able to form a correct judgment on those points, and a decision on all those points by that tribunal.

This Court has more than once decided, that in such a case in the United States Courts an appellate tribunal will not review the decision of the Court below.

Home Ins. Co. v. *Barton*, 13 Wallace, 603.

Pittsburgh R. Co. v. *Heck*, 102 U. S., 120.

The opinion of the Court of Appeals, however, carefully considers the evidence on all the issues in the case;

shows that that evidence was much more than sufficient to sustain the verdict; and shows also, which is much more to the purpose, that the defense failed to except to the portions of the charge on those points which are now alleged to constitute error.

Opinion, pp. 620, 621, 622.

We submit the folowing positions:

I.—The fraud in this case consisted of more than mere false representations. It was a most ingenious combination—of words of falsification, and acts of falsification; the words of falsification being mainly contained in the Burnham report; the acts of falsification consisting mainly in the fabrication by the defendant, complete or partial, of that report; together with an elaborate and comprehensive falsification of the mine, and of Egan's mill-run, so contrived as to make an accurate estimate of the value of the mine an impossibility; and to virtually compel a belief in the accuracy of the statements of the Burnham report.

Although the Burnham report purported, in many of its statements of fact, to relate to the mine's product of the past, yet the main evident purpose of the false statements in the Burham report as to the mine's past product, was to deceive and defraud purchasers as to *its value at the time of purchase*. They were intended to have that effect. It was a certainty, that they would have that effect.

Here it is well to call attention to two ingenious points made by our opponents; they are, that the Burnham report was undated; and that it showed on its face, by careful computation, that many of its statements were false. In fact, the defendant himself was finally compelled to take the position, that he was aware of the

falsity of the statements, and that consequently he forbade the use of the report.

Testimony of defendant, fols. 1028-1030.

Under those circumstances, we submit, that in the absence of a date to a paper which is conceded to be a fabrication, the parties to whom it was delivered had the right to assume that it spoke as of the date of its delivery.

The other point, that the plaintiffs had no right to rely on a forged paper, the falsity of which could be shown by careful mathematical analysis from its own figures—we respectfully submit, that such an argument, coming from the party guilty of the forgery, has in it an element of the humorous.

It is also too plain for argument, that although the Burnham report contained many statements of matters of mere estimate and opinion, it was also full of statements as to matters of fact. Moreover, it was those statements as to matters of fact, which gave to the Burnham report nearly its power for fraud and deceit.

The legal principles and rules applicable to the case established by the evidence are to be found in the following authorities:

Smith v. *Richards,* 13 Peters, 26, 35.
Mudsill Min. Co. v. *Watrous,* 61 Fed. Rep., 163, 167, 168.
Farrar v. *Churchill,* 135 U. S., 609, 615.
Benton v. *Ward,* 47 Fed. Rep., 253, 256.
Henderson v. *Henshall,* 54 Fed. Rep.,320.
Roseman v. *Canovan,* 43 California, 110.

Smith v. Richards, 13 Peters, 26, 35, contains a very full statement of the law applicable to cases like the one at bar. That case was one where the fraud in question had prevented an examination from being made. But the principles and rules there stated apply with equal force to the cases, like *Mudsill Min. Co.* v. *Watrous*, 61 Fed. Rep., 163, where the fraud consisted largely in the falsification of samples, which made it an impossibility that the examination made should give an accurate estimate of the real value of the mine at the time of the examination.

In *Smith* v. *Richards*, p. 35, the Court say:

"We think that the specimens and washings which were forwarded to Nathaniel Richards were not fair samples of the mine.

"The only proper purposes for which they could have been exhibited, was to enable purchasers to form an estimate of the richness of the mine; the appellant, therefore, in our opinion, ought to have caused to be exhibited, either specimens of the richest and poorest quality, so as to show the extremes, or some of an average quality, knowing that the persons to whom he requested them to be exhibited, and amongst them the appellee, had never seen the mine. *Any other course, under the circumstances, could not fail to produce a false estimate of its value.*

"Having come to these conclusions in relation to the facts of this case, the next inquiry in order is, what is the law of the case?

"It is an ancient and well established principle, that whenever *suppressio veri* or *suggestio falsi* occur, and more esepecially both together, they afford a sufficient ground to set aside any release or conveyance.

"This ancient principle, thus expressed with so much sententious brevity, is laid down in terms somewhat more comprehensive, and having a direct bearing on the present case, by a modern text writer on equity.

"In 1 Maddock's Chancery, 208, it is thus stated: 'If, indeed, a man, upon a treaty for any contracts, make a false representation, whether knowingly or not, by means of which he puts the party bargaining under a mistake upon the terms of bargain, it is a fraud and relievable in equity.' The doctrine thus laid down is almost in the very words used by the Chancellor, in the case of *Neville* v. *Wilkinson* (1 Brown's Chan. Cases, 546), with the exception of the words whether knowingly or not; and the part of the proposition embraced by these words, is founded upon the case of *Ainslie* v. *Medlicot* (9 Vesey, 21), which fully sustains Mr. Maddock. In this latter case the following strong language is used: 'No doubt, by a representation a party may bind himself just as much as by an express covenant. If, knowingly, he represents what is not true, no doubt he is bound. If, without knowing that it is not true, he takes upon himself to make a representation to another, upon the faith of which that other acts, no doubt he is bound, though his mistake was perfectly innocent.'

"But the doctrine is laid down with more comprehensiveness and precision by a still more modern writer on equity, who gives us, in the form of distinct propositions, what he considers the result of the various cases on the subject, and marks, with particularity, the modifications which belong to it.

"In 1 Story's Equity, 201, 202, it is thus stated: 'Where the party intentionally, or by design, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him, in every such case there is a *positive fraud, in the truest sense of the terms;* there is an *evil act,* with an *evil intent—dolum malum, ad circumveniendum.* And the misrepresentation may be as well by *deeds or acts,* as by words—by *artifices to mislead,* as by *positive assertions.*'

"Whether the party thus misrepresenting a fact, knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial,

for the affirmation of what one does not know, or believe to be true, is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false. And even if the party innocently misrepresents a fact by mistake, it is equally conclusive, for it operates as a surprise and imposition on the other party. Or, as Lord Thurlow expresses it, in *Neville* v. *Wilkinson*, 'it *misleads the parties contracting, on the subject of the contract.*' * * * * (p. 37.)

"The principles of these cases we consider founded in sound morals and law. They rest upon the ground that the party selling property *must be presumed to know whether the representation which he makes of it is true or false.* If he *knows it to be false,* that is *fraud of the most positive kind;* but if he does not know it, then it can only be from gross negligence; and in contemplation of a court of equity, representations founded on mistake, resulting from such negligence, is fraud. (6 Ves., 180, 189; Jeremy, 385, 386.) The *purchaser confides in it, upon the assumption that the owner knows his own property, and truly represents it;* and, as was well argued in the case in Cranch, it is *immaterial to the purchaser whether the misrepresentation proceeded from mistake or fraud. The injury to him is the same, whatever may have been the motives of the seller.*

"We will next inquire whether the misrepresentation in this case comes up to the rule which has been laid down. In the first place, it must be of matters of fact; and it has been argued by the appellant's counsel, that the letter of the 21st of January, 1833, *did not profess to state matters of fact, but to express opinions.* It is certainly true, that matters of opinion between parties dealing on equal terms, although falsely stated, are not relieved against; because they are not presumed to mislead, or influence the other party, *when each has equal means of information.* But we consider the representation in this case *not the expression of opinion, but the statement of facts.* The appellant, in giving a description of a mine in Virginia, which he desired to be ex-

hibited to the appellee in New York, says, that one hundred feet on the vein had been delevoped, which proved to be very rich, much richer than anything yet discovered in the United States. That the surface was rich in gold; that the *formation was quite wide, and in one place twelve feet; that the veins were disseminated throughout the whole formation, in threads of from two to six inches wide; and that there was ore from the mine that would without doubt give several hundred pennyweights of gold to the hundred pounds.* Now, as to *one of these statements, beyond all question is a matter of fact;* we mean the one which *describes the width of the formation and veins.*

"Having made a personal examination, he declares the formation to be wide, *gives the actual width in one place, and then the width of the veins, in terms not of conjecture, but of the most positive assertion. He gives their dimensions by feet and inches.* This statement, then, comes up to the *standard of mathematical certainty.* And even in regard to the others, he *does not profess to speak of them from conjecture,* but speaks of them *as they are, without qualification.* Take, for example, this:—The surface is rich in gold. *Not that he thinks it will turn out to be rich, but that it is rich.* It was argued that there was no standard by which to decide what quantity of gold would justify calling it rich. There is *none by which it can be decided with mathematical certainty;* but the *law does not require it.* Suppose that a seller was to describe to a distant purchaser, a tract of land as being rich, and it were proven to be poor, or very poor. Can it be that a court of equity would not give relief in such a case? The *certainty in the one case is as great as in the other;* and the misrepresentation as to richness must be proven in each case, by the evidence of those who understood the quality of the one or the other."

In *Smith* v. *Richards,* too, where a decree of rescission of the sale of a gold mine was granted on the ground of

fraud, and affirmed in this Court, the counsel for the appellant, Mr. Webster and Mr. Ogden, conceded, (p. 28,) that the decree ought to be affirmed, if "it should also appear, that he committed positive fraud, by *resorting to some means of concealing the defects and misdescription, and by artifice and contrivance* prevented the purchasers from discovering them."

In *Mudsill Min. Co.* v. *Watrous*, 61 Fed. Rep., 167, 168, the Court say:

"If, therefore, the party making false statements as to a matter conjectural in its character, and therefore relating to a matter of opinion, *actively intervene to prevent* investigation and *the discovery of the truth*, and *such intervention be effective in the concealment of the facts and in the deception of the buyer, a clear case of operative fraud is made out.* In every such case *immunity will not be extended to false expressions of opinion*, upon the ground of 'puffing' or 'trade talk,' if it appears that the vendor has, by his conduct, prevented investigation, and induced reliance upon the statements of the seller. In such a case the subsequent *conduct of the seller in actively preventing the buyer from the formation of an independent opinion so connects itself with the original misrepresentation as to become part and parcel of the false statement*, and amounts in law to *the false affirmation of a fact. A false representation* may, and most often does, consist in language alone, expressed or written; but it *may also consist in conduct alone, or external acts.* Whenever the purpose is to *induce belief in the existence of a fact which does not exist*, every word and *act intended to produce conviction and induce action becomes a misrepresentation if, through their instrumentality, the party upon whom they are practised is induced to act.* 2 Pom. Eq. Jur., §877. The gravamen of the alleged fraud lies in the allegation that when the complainants undertook to examine this property, and form an independent judgment as to its value, through the *active and willful intervention of de-*

fendants, their samples were rendered untrustworthy by the secret admixture of silver in a form in which it did not exist in this mine; that the *purpose was to give to these samples, otherwise representative of the average value of the ore in sight, a false and fictitious value, which would confirm the untrue statements expressed theretofore as to the silver contents of the mine.* Now, it must be evident that, if this was done, a *most abominable fraud was practised,* and that *no court would suffer a contract resting upon such a foundation to stand.* *

II.—At the outset, it is necessary to call to the attention of the Court the well established fundamental distinction, between the two opposite remedies in cases of fraud; the one being that of rescission, usually asserted in a court of equity, which proceeds on a disaffirmance of the contract, and entitles the purchaser to return the property purchased, and recover the consideration paid —as such; the other being the right to damages in a common law action of deceit, which proceeds on an affirmance of the contract, wherein the defrauded purchaser retains the property purchased, allows the vendor a credit for the actual value of that property, and recovers as his money damage the difference between the actual value and the value represented.

Yeomans v. *Bell,* 151 N. Y., 230.
Bradley v. *Bosley,* 1 Barb. Ch., 125, a decision by Chancellor Walworth.
Krumm v. *Beach* 96 N. Y., 398.
Gould v. *Cayuga Bank,* 86 N. Y., 75.
S. C., 99 N. Y., 333.

The disregard of this distinction, a distinction which no well considered authority denies, has been the source of nearly all the doubts and discrepancies in the state

ment of the rule of damages in actions of deceit. Indeed, it is submitted with all possible deference, that it was the disregard of this distinction which led the Court in *Smith* v. *Bolles* to make some unnecessary statements, which are at variance with the mass of authority already cited.

The right, in a case of false representations, to recover the money consideration paid —as such—rests only on the right of rescission. No doubt, there will at times be a case, where a purchase had been made of property which was absolutely worthless, where it will happen that the money paid is, in that particular case, equal to the damage from the deceit. In such cases, however, the money consideration merely happens to be the equivalent of the damage, for the reason that it happens to be equal to the value as represented; and it is, therefore, the equivalent of the difference between the represented value, and zero—which is the actual value. Nevertheless the law still is, that the money consideration—as money consideration—can be recovered only on the basis of rescisson. It cannot, therefore, ordinarily, be recovered in an action for deceit. For that action, as before stated, rests on an affirmance.

In some cases, too, confusion may have arisen from the circumstance that the contract price is admissible *as evidence*, of the value of the thing as it is represented. That it is evidence, but not conclusive evidence, on that point, is laid down in several cases, which nevertheless affirm the rule for which we contend.

Carr v. *Moore*, 41 N. H., 131.
Estell v. *Myers*, 56 Miss., 800.
Lunn v. *Shermer*, 93 N. C., 164.

So it has often happened, in cases where the distinction was not clearly brought out, that the contract price

and the represented value have been used as convertible terms. Such a case was

Sherwood v. *Sutton*, 5 Mason, 1,

of which the headnote states the rule of damages precisely as we are here contending for it; while from the opinion of Mr. Justice STORY it might seem that the contract price was the basis of the estimate of damages which he there allowed. Of the same class was the case of

Weybrick & Co. v. *Harris*, 31 Kansas, 92,

in which the opinion of the Court by Mr. Justice BREWER states the rule in both forms. It is perfectly apparent, however, that the learned Justice did not intend to sanction any departure from the established rule, which he stated as follows:

"If the vendor knows nothing of the contracts made by the vendee or the specific purpose for which the property is intended, and knows simply that the purchaser is seeking for an article of the kind and quality named, his liability is limited to the *difference between the value of the article actually delivered and that of the article which the parties intended to purchase and contract for.*"

III.—This distinction between the two remedies being borne in mind, we respectfully submit, that in the class of cases, where the defrauded vendee exercises his well established legal right, to retain the property and recover his money damage, especially in cases like the one at bar, where by reason of the complete success of the fraud no other course is possible, the only rule of

damages, which will work out justice, which will place the entire transaction on the basis contemplated and intended by the parties themselves, and will give the most precise estimate possible, of the precise money damage intended by the guilty party, is the rule established by a long and unbroken line of authorities down to *Smith* v. *Bolles;* those authorities all resting on the principle stated by this Court in that case as the controlling principle, which this Court had no intention of overruling or questioning.

1. The rule in actions for deceit is precisely the same as in cases of warranty.

The difference between the two cases, so far as concerns this point, is only one of form and pleading.

Schuchardt v. *Allens*, 1 Wallace, 359.
Williamson v. *Allison*, 2 East, 446.

In the case of a mere contract of warranty, made honestly, where property sold is warranted—to be of a certain quality, the rule is uncontroverted; the measure of damages, on a breach of such a contract, is the difference between the actual value of the property received, and the value of the property as warranted. In other words, the defendant is compelled to make good his statements. That is the case, where the misrepresentation has been honestly made, as matter of contract.

In cases of deceit, where the ground of the liability is a representation wilfully false, made for the express purpose of deceit and fraud, the rule should not be more favorable to the wrongdoer than it is to the party who merely honestly makes a contract, which he afterwards fails to perform.

It must be conceded, that the wrong accomplished is precisely the same in both cases. It must be conceded, also, that the wrong intended is precisely the same in both cases. The argument of the learned counsel then

amounts to this: That the rule as to damages should be more favorable to the party who is guilty of deliberate fraud and deceit, than it is to one who merely honestly fails to perform a contract.

This argument goes too far. No Court has ever held, that in such a case the party deceived was deprived of all remedy. The only possible controversy on the point of damages, in such a case, must be as to their measure. As to that point, it is quite apparent that the injury is the same. It s also apparent that the injury is accomplished by substantially the same act. We fail therefore to see any reason, why the rule of damage should be at all different in the one case from what it is in the other. In both cases the intent of the party is the same. The result accomplished is the same. The loss inflicted is the same. The rule of damage should be the same.

2. The rule, and its reason, are stated in the following opinions of the Massachusetts Supreme Court, the New York Court of Appeals, and the Supreme Court of Kansas.

Morse v. *Hutchins,* 102 Mass., 439. Tort for deceit, GRAY, J. "The rule of damages was rightly stated to the jury. It is *now well settled* that, in actions for *deceit or breach of warranty,* the measure of damages is the *difference* between the *actual value* of the property at the time of the purchase, and its *value if the property had been what it was represented or warranted* to be. (Citing Stiles *v.* White, 11 Met., 356. Tuttle *v.* Brown, 4 Gray, 457. Whitmore *v.* South Boston Iron Co., 2 Allen, 52. Fisk *v.* Hicks, 11 Foster (N. H.), 535. Woodward *v.* Thatcher, 21 Verm., 580. Muller *v.* Eno, 4 Kernan, 597. Sherwood *v.* Sutton, 5 Mason, 1. Loder *v.* Kekule, 3 C. B. (N. S.), 128. Dingle *v.* Hare, 7 C. B. (N. S.), 145. Jones *v.* Just, Law Rep., 3 Q. B., 197.) *This is the only rule which will give the purchaser adequate damages for*

not having the thing which the defendant undertook to sell him. To allow to the plaintiff (as the learned counsel for the plaintiff argued in this case) *only the difference* between the *real value* of the property *and* the *price* which he was induced to pay for it, would be to make any *advantage* lawfully secured to the innocent purchaser in the original bargain *inure to the benefit of the wrongdoer;* and in proportion as the original price was low, would afford a *protection to the party who had broken,* at the *expense of the party who was ready to abide by the terms of the contract.* The fact that the property sold was of such a character as to make it *difficult to ascertain with exactness* what its *value* would have been *if it had conformed to the contract* affords no reason for exempting the defendant from any part of the direct consequences of his fraud. And the *value may be estimated as easily in this action as in an action against him for an entire refusal to perform his contract.*"

Krumm v. *Beach,* 96 N. Y., 398, which was an action for deceit on a sale of land:

"The measure of damages in such a case is *full indemnity to the injured party;* the entire amount of his *loss* occasioned *by the fraud.* (*Dimmick* v. *Lockwood, 10 Wend., 105; Wardell* v. *Fosdick, 13 Johns., 325, and, Whitney* v. *Allaire, 1 Comst., 305-6.*) The first of these cases plainly points out the *difference* between actions for a *breach of covenant* and those founded upon *fraud.* In the *former* the *damages* are always bounded by the *consideration* and interest, which *often fall short of full indemnity;* a rule said to be founded "upon considerations of public policy without reference to the actual damage sustained by the party." (*Whitney* v. *Allaire, supra*); "but where *fraud* is established, *full and complete indemnity* is awarded. That full indemnity *may go beyond the consideration paid.*

The purchaser of land, as of other property, has a right to make a good bargain if he can, provided only that he deals honestly. Often *the profit secured above the price paid is the sole motive for the purchase,* and where there is an exchange of lands to some extent, one dealing fairly may sell his own at a high price and secure another's at a low one. To the *entire benefit of his bargain he is entitled.* If there has been no fraud he would have had it; he *should not lose it because the other party had been dishonest.* The measure of damages, therefore, should be that adopted by the Court below; *the difference in value between the property conveyed and that which would have been conveyed had the property been as represented,* and the actual contract honestly fulfilled."

Tracy v. *Gunn,* 29 Kansas, 508, (1883). Action by vendee against vendor for damages for deceit on a total failure of title. The Court say, per Mr. Justice BREWER: "The second question is as to the measure of damages. Plaintiff in error claims that it was only *the price paid and interest,* while the Court admitted testimony as to the value of the property at the time of the deed, and rendered judgment for such value. * * * In breaches of contract to convey real estate, a peculiar distinction as to the measure of damages runs through the cases, and that founded upon the motive with which the vendor acts. If he acts in *good faith,* it is held that the *contract price* becomes the measure of damages, while if he acts *mala fide,* the vendee may recover the actual damages." The learned Justice then quotes and approves Field on Damages, §485; Sedgwick on Damages, p. 209, to the effect that law which aims to give to a party *all the damages which he has actually sustained."*

"It is enough for us to say that the doctrine seems to be clearly established, that is, founded on justice,

and that it is in harmony with the general rules of the law which aims to give to a party all the damages which he has actually sustained."

3. The universality of the acceptance of the rule is shown by the following line of authorities:

Whitney v. *Allaire*, 1 N. Y., 305, 312.
Miller v. *Barber*, 66 N. Y., 558.
Hubbell v. *Meigs*, 50 N. Y., 480, 491.
Pryor v. *Foster*, 130 N. Y., 171, 178.
Pierce v. *Tiersch*, 40 Ohio St., 168, 173 (1883).
Lunn v. *Shermer*, 93 N. C., 164, 170 (1885).
Shinnabarger v. *Shelton*, 41 Mo. App., 147, p. 157, 1890.
Gunther v. *Ullrich*, 52 N. W. Rep., 88 (Wis. Supm. Ct., 1892).
Wright v. *Roach*, 57 Maine, 600 (1870).
Williams v. *McFadden*, 23 Fla., 143, 149 (1887).
Herfort v. *Cramer*, 7 Col., 483, 491, 1884.
Foster v. *Kennedy's Admr.*, 38 Ala., 359, 1862.
Budlong v. *Cunningham*, 11 Ill. App., 28, 32.
Johnston v. *Beeney*, 5 Ill. App., 604.
S. C., 9 Ill. App., 64.
Antle v. *Sexton*, 32 Ill. App., 437, 440.
S. C., 137 Ill., 410, 415.
Drew v. *Beall*, 62 Ill., 164, 168.
Stiles v. *White*, 11 Met., 356.
Harvey v. *Hadley*, 87 Cal., 557.
Murray v. *Jennings*, 42 Conn., 12.
Thompson v. *Burgey*, 36 Pa. St., 403.
Stetson v. *Croskey*, 52 Pa. St., 230.
Bowman v. *Parker*, 40 Vermont, 410, 413-414.
Noyes v. *Blodgett*, 58 N. H., 502.

Gales v. *Reynolds*, 13 Iowa, 1.
Molberly v. *Alexander*, 19 Iowa, 162.
White v. *Smith*, 54 Iowa, 233.
Page v. *Wells*, 37 Mich., 415, 421.
Jackson v. *Armstrong*, 50 Mich., 65, 69.
Stockham v. *Cheney*, 62 Mich., 10, 14.
Campbell v. *Hillman*, 15 B. Monroe, 508 (Kentucky).
Estell v. *Myers*, 56 Mississippi, 800, 805-806.
Young v. *Filley*, 19 Nebraska, 543.
Long v. *Clapp*, 15 Neb., 417, 420.
Ansyln v. *Frank*, 8 Missouri App., 242, 248.
Tracey v. *Gunn*, 29 Kansas, 508.

4. The following were cases of warranty where the same rule of damages was applied:

Clare v. *Maynard*, 7 C. & P., 741.
Walker v. *France*, 112 Pa. St., 203, 211.
Seigworth v. *Leffel*, 76 Pa. St., 476.
Jones v. *Just*, L. R., 3 Q. B., 197, 200-201.
Callanan v. *Brown & Co.*, 31 Iowa, 333 (341).
Maxted v. *Fowler*, 94 Mich., 106.
Tutile v. *Brown*, 4 Gray (Mass.), 457.
Whitmore v. *So. Boston Iron Co.*, 2 Allen (Mass.), 52, 60.
Peterkin v. *Martin*, 30 Louisiana Ann., 894.
Foster v. *Baer*, 7 Louisiana Ann., 613.
Slaughter v. *McRae*, 3 Louisiana Ann., 455.

5. So far as we are aware, down to the decision of *Smith* v. *Bolles*, not one well considered opinion can be found, coming from any court of authority, where there has been, in the language of Mr. Justice CURTIS, in *Carroll* v. *Carroll's Lessee*, 16 Howard, 275, "an application of the judicial mind to the precise question," where this established rule has been so much as called in question.

Peek v. *Derry*, Law Rep., 37 Chanc. Div., 541, on which the defense so strongly depended on the argument in the court below, as establishing a different rule in England, is not at variance with the established rule. An examination of the record in that case shows that, on the hearing below the action was dismissed, and, consequently, the question of damages was there neither argued nor considered. On the appeal, too, the questions which were the subject of the main discussion by counsel concerned only the right of the plaintiff to any recovery whatever. *Prior to the rendering of the opinion of the Appellate Court, the arguments of counsel on the appeal made no allusion to the rule of damages.* But Lord Justice Cotton, in reversing the decision below, added, at the end of his opinion, a paragraph on the question of damages. In that paragraph he said that the plaintiff would be entitled to recover "the difference between the sum given for the shares and the value of the shares." Evidently, that opinion went on the assumption, that the "sum given" was—in that case—equal to the value represented; and, consequently, a recovery on that basis—in that case—would, in substance and effect, conform to the established rule.

Thereafter (p. 590) the question of damages was argued. But the only point of substantial controversy on the later argument was, not as to the measure of damages, but the date, at which the measure should be applied.

Thereupon the Court said (p. 591): "One rather difficult point was *omitted in the argument.* * * * It is one of considerable difficulty. The question which arose was this: There *being no evidence which would really fix the loss,* we thought there ought to be an inquiry; but the *question was to what period ought that inquiry to refer?*"

That was really the only point considered, and decided, in *Peek v. Derry.*

Obviously that case, like many others, was one where the special facts led both counsel and Court to ignore the general rule. And it is quite obvious, that neither Court nor counsel had any intention of questioning the established rule.

There are many such cases. Many cases, then, can be cited, where, for one or another reason, the well established general rule has been inapplicable, or has not been invoked.

But we find *no well considered case,* where the rule, when invoked, and when applicable, has been denied, or even questioned.

Cooper v. *Schlesinger,* 111 U. S., 148, was not a case where the Court gave the question of damages a judicial consideration. The Court simply *held,* that the rule stated in the charge in that case was substantially in accordance with the request of the plaintiff in error, and therefore that the plaintiff in error was not prejudiced by the rule as there stated. The case, therefore, is not an authority.

6. The established rule is the only one which will carry into effect the controlling principle, as it is stated by our learned opponents, by all the authorities, and by this Court in *Smith* v. *Bolles;* that is, that the recovery is to be of "such damages as naturally and proximately resulted from the fraud;" or "the natural and necessary result of the false representations."

Brief of plaintiff in error, pp. 3 & 8.

We accept, without hesitation, these statements of the principle underlying the rule.

Let us now see how the principle can be worked out in practice.

(*a.*) In cases of rescission, where the purchased property is returned, there is, no doubt, the logical legal basis for a recovery of the money paid—as such.

(*b.*) In actions for deceit, however, where the property purchased is retained, where, consequently, the damage must be limited to the loss caused by the deceit, it is easily seen, that the money paid, as such, affords no criterion of the resulting damage. Take a simple case, the purchase of a farm, represented, among other things, to contain two hundred acres of rich intervale; in fact, containing only one hundred acres of such land. The fraud proved is only the misrepresentation of the one fact of quantity. The damage recoverable could legally be based on only that one misrepresentation. Although a rescission would entitle the purchaser to recover the entire consideration, yet his common law action of deceit, based on a retention of the property, would, very clearly, entitle him only to the difference in value between a farm containing two hundred acres, and one containing one hundred acres, of intervale; in other words, to the difference between the actual value and the value as represented.

So, too, in the case of a gold mine. Take the case where the vender has falsely represented, that the ore in the mine lies in a continuous unbroken vein, running a certain number of ounces of gold to the ton, with a certain number of tons of ore of a particular grade actually "in sight"; the fact being, that the vendor has for years been working the mine, so as to leave considerable stretches of the richest ore exposed to sight, and has filled up long spaces of the vein which were completely barren, so that they could not be discovered on any practicable examination. Suppose, in such a case, that the purchaser, after his purchase, has taken out large quantities of poor ore and worthless dirt, in a fruitless search for ore that will pay. A return of the property in its original condition, in other words rescission, has been made impossible, by the very action which the vendor intended, the removal of large amounts of ore by the purchaser.

In such a case, what rule can possibly be devised, other than the old established one, which will fix the damage

"proximately resulting" from the deceit? The consideration paid, together with the money spent in development, may be very large. The difference, however, between the actual value of the property and its value upon such representations as a jury finds were false, may be very slight. In a few exceptional cases, it may be possible to recover money spent in the search for the ore falsely stated to have been in the mine. But, in the general run of cases, can it be reasonably contended, that the purchaser can recover his money expenditure—in an action for deceit? No doubt, the fraud perpetrated gave him his other right—that of rescission; and, *if a rescission were still possible*, he would be entitled, on a rescission, to recover the consideration paid—as such. In the action for deceit, however, his right is only to the above stated difference.

(*c.*) Careful consideration will show, moreover, that the established rule is the only one that will effectuate the intention of the parties to the transaction, as expressed by themselves, and that any other will put the transaction on a basis which the parties themselves never contemplated.

Assume a case where, on the representations made, the value of the property sold as represented is twenty-five thousand dollars. But its actual value is only fifteen thousand. For their own good reasons, the parties make a sale at fifteen thousand. In other words, the price paid happens to be precisely equal to the real value. The purchaser believes the representations; in other words, he believes the value to be twenty-five thousand dollars. Such is the statement of the seller, on which the purchaser relies, and on which the seller intends him to rely. In other words, the seller intends the purchaser to believe, that he is getting a property worth twenty-five thousand dollars at the price of fifteen thousand. The purchaser makes the purchase by reason of that belief: and the belief is caused by the wilful fraud of the seller.

The transaction intended by the parties goes on the very basis, that the purchaser is to have a profit of ten thousand dollars. That is the result intended, by the transaction as expressed by them.

Under the rule for which our opponents contend, there can be no recovery whatever, because the consideration paid is no more than the actual value. In other words, the buyer must lose his profit of ten thousand dollars, to which he was entitled under the transaction, as expressed, and intended, by both parties; a profit which was evidently directly in the contemplation of both parties, as the inducement to the purchase.

The buyer, in such a case, is justly entitled to the value, which he believed he was getting; that belief being created by the seller, who knew the real facts, and produced the belief by the perpetration of a wilful fraud. The seller is justly condemned to make good to the buyer the value which he stated to the buyer, falsely, with the intent to deceive, which constituted the very basis of the transaction.

The precise fraud, intended by the guilty party, was the sale of a property actually worth only fifteen thousand dollars, on the belief of the purchaser, that he was getting a property worth twenty-five thousand dollars. No rule can be devised, which will work justice, in that case, or in any case of wilful deceit, except the rule that the guilty party shall be compelled to make good his statements. On the other hand, the rule for which our opponents contend, necessarily has for its result the protection of the party committing the fraud, and the protection of the precise fraud, which the guilty party intended.

(*d.*) If it be said, that the result of the old established rule is to give the purchaser prospective profits, the answer is, that such is the intention of the parties to the transaction.

The seller says, in effect, "I am selling you a property worth twenty-five thousand dollars, at such a price as will ensure you a profit of ten thousand." That is the precise inducement, held out to the purchaser, on the basis of which he makes the purchase. That precise profit is exactly what the transaction— as expressed between the parties—gives him. No other rule will effectuate the transaction on the basis contemplated, and intended by the parties.

We accept unhesitatingly the principle laid down by the Court in *Smith* v. *Bolles,* which we understand to be contained in the extract made by the Court from Mr. Greenleaf and from the opinion in *Crater* v. *Binninger,* 33 N. J. L., 538, 513, in the following words:

"The damage to be recovered must always be the natural and proximate consequence of the act complained of," says Mr. Greenleaf, and in the language of Chief Justice Beasley "That test is that those results are proximate which *the wrongdoer from his position must have contemplated as the probable consequences of his fraud or breach of contract.*

Without questioning here the soundness of the application of this principle to the facts which appeared upon the record in the case of *Smith v. Bolles,* we state again that we accept without hesitation the statement of that principle there given; and we maintain that the only possible way in a case like the one at bar of estimating "the natural and proximate consequences of the act complained of," and of ascertaining "those results which the wrongdoer from his position must have contemplated as the probable consequence of his fraud," is to compel him to make good the difference between the facts and his false representations. That difference is, we maintain, the precise result which he must have contemplated as the probable consequence of his fraud.

He understood that the plaintiffs really expected that they were getting what he represented; at the same time he had positive knowledge that they were not getting the property as he was representing it but were getting it only as it existed in fact. The precise consequence, the proximate consequence, then, of his wrongful act, which he intended, which he contemplated, which he knew he would accomplish by the precise fraud that he committed, was to induce the plaintiffs to pay for a property having the features that he represented; when, in fact, they were getting a property which was very different. The only possible way of redressing that precise wrong is to hold him responsible for that precise difference—between the value of the property as it existed in fact, and the value of the property according to his representations. No way can possibly be devised, we submit with all deference, which will accomplish that result except to apply the principle stated in *Smith v. Bolles*, as it was applied in the case at bar by the charge of the Court following the long line of authorities in which that principle had been applied in many previous cases.

In the case supposed the "result which the wrongdoer from his position must have contemplated" is the loss of that profit—of ten thousand dollars. That is the precise loss "contemplated," by the party committing the fraud, as the consequence of his fraud. He intends that precise damage. Both buyer and seller intend the transaction to go on the basis of value represented. That being so, we respectfully submit, that a court has no option, but to enforce the transaction on the basis intended by the parties. When the parties both intend a sale at a price less than the value as stated by the seller, the courts have no right—to put the transaction on any other basis than the one on which it is placed by the parties themselves.

It is wholly inaccurate, to apply the term "speculative," in its commercial sense, to the plaintiff's recovery

under the established rule. A "speculation," in that sense, involves the purchase of property with a view to its advance in value at a future day. Under the established rule of damages, the comparison of the two values —"represented" and "actual"—is made as of the same point of time, the date of the sale. The plaintiff's recovery is for the difference between the two at that date.

Nor does the established rule involve any question of future prices on the "market." The rule for which we contend, has no concern with "market" value—as such—but only with "actual" value.

The term "market value" as used in the charge, and on the trial, meant nothing more nor less than "money value."

(*e.*) The contention of the defendant that the established rule allows "contingent," or "speculative" profits, has no sound foundation.

The recovery, under the rule, it must be repeated, is of the difference between actual value and represented value, *both taken on the same date.*

The false statements submitted to the jury, in every such case, concern only matters of fact. So the certificate in this record states as to this case. How was it possible to devise anything more saturated with statements of fact—than the so called Burnham report? If, thereafter, it appears that, by what may be termed mineral forgery, he made an accurate examination of the mine impossible, and thus deceived his vendees by his false statements of mere quantities, of mere figures, how was it possible more completely to exclude from the jury's computation of damages the element of the "contingent," or the "speculative," than by the rule, that the damage resulting from the deceit is the difference, be-

tween the value on the false statement, and the value on the fact? How is it possible, to "make the punishment fit the crime" with greater accuracy?

A jury "speculates" no more under this rule, than it is compelled to do in any case involving complicated questions as to the values of land; or, indeed, than it does in many cases of a valuation of personal property; or in cases of many kinds, which are decided on the opinions of experts.

It is precisely as easy, moreover, for a jury to estimate represented value, as actual value. Both are estimated, by experts, *on facts assumed*—which is merely one method of description. In estimating actual value, so-called, the land is described—by witnesses; then, on those facts assumed, that is, on that description, experts give their opinions, and, on those facts assumed, with the opinions, the jury forms its conclusion. In estimating represented value, the case is submitted in precisely the same way, on facts assumed; that is, on a description, of the same kind as that used in submitting the question of actual value, (the facts assumed being the facts falsely represented); the experts thereupon give their opinions on *that* description; and the jury thereupon form their conclusion as to *that* value. The method is precisely the same in both cases. The one involves just as much speculation, and conjecture, as the other. And no more.

Our opponents are compelled, by the necessities of their situation, to make an assault on the established general rule, under cover of an insinuation as to the character of the property purchased in this particular case.

It is quite evident, that the character of the purchased property, in any particular case, has no logical, or legal, connection with the general rule of damages for all cases. Even if, therefore, it were the fact, that the purchase in this particular case had been of a property more or less "speculative," that fact would have no bearing whatever on the general rule of damages, either as to its principle, or its statement.

If, therefore, we assume, that the purchase of this gold mine was, to some extent, "speculative," the question still remains, what was the reasonable rule, the best rule practicable, under which a jury should make its estimate of the damage resulting from a wilful deceit, as to *matters of fact.* For, of course, misrepresentations as to matters of opinion were not submitted to he jury.

The record in his case, moreover, is, that there was "sufficient proof to enable the jury to determine," both the "represented" value, and the "actual" value—as matters of fact.

It may be conceded, that the established rule allows a jury a wide latitude of estimate. But that constitutes no valid objection to the rule. That latitude is unavoidable. That possibility exists in many cases; in cases of damages for loss of time; damages to the person; to the feelings; injuries to real estate; and in cases of many other classes. The rule in actions of deceit is no mor difficult of application than in many others.

(*f.*) Nor does the contention of the defendant below, that the rule gives no credit or allowance to the defendant for the value of the property purchased, rest on good grounds.

On the contrary the rule does precisely that. It does make an allowance to the defendant for the real value, when it directs the jury to assess damages at the difference between the real value and the value as represented. The fact that the rule makes that allowance constitutes one of the chief reasons on which the rule rests.

On the other hand, one of the chief objections, the rule which allows a recovery only of the money paid, is that it gives no consideration whatever to value, either to the value in fact, or the value as represented. .It simply allows a purchaser to rescind. It does not rest upon the basis of awarding the actual damage caused by the proved deceit. It simply gives to the purchaser the right to abrogate the entire transaction. In other words,

it allows, to a party who has been deceived by false statements, his other remedy—rescission. In short, it is in cases of rescission, and only in cases of rescission, that the purchaser has the right to recover the money consideration paid—as such.

And in cases where the success of the fraud has made recission impossible, full redress for the wrong committed is possible only under the old established rule.

(*g.*) The established rule works out justice to both parties, as perfectly as possible.

The contract of sale stands. The plaintiff retains the purchased property. The defendant retains the purchase price. The defendant is then credited with the actual value, and is required simply to make good his false and fraudulent representations, by paying to the plaintiff the difference between the actual value and the value represented.

Especially in cases, where the deceit alleged is complex, as was the fact in the case at bar, where it was a combination of representations and acts, of acts which made the verification of the representations impossible, it is quite appaernt that the established rule is the only one practicable, for the reason that the fraudulent acts charged may not all be found by the jury; and it is only for such as the jury find to be established on the evidence, that damages can be allowed. It is obvious, that to allow in all such cases a recovery of the money paid would be quite contrary to the principle which constitutes the foundation of the rule.

These considerations are the ones which have led the ablest jurists in England and the United States, to establish, and adhere to, the same rule in cases of deceit, which they all follow in cases of warranty, unless the intention was to lay down a wholly different rule in *Smith* v. *Bolles*.

IV.—The Court, in *Smith* v. *Bolles,* had no intention of departing from the established rule.

A careful examination of the record, with the authorities cited, will show that the Court only intended in that case to deny the right to remote and doubtful possible profits, which could not reasonably have been contemplated by the parties.

1. The opinion is of course to be read after the method recently laid down by the Court itself in *Pollock* v. *Farmers' Loan and Trust Company,* 157 U. S., 429, by Mr. Chief Justice Fuller (at page 574).

"Doubtless the doctrine of *stare decisis* is a salutary one, and to be adhered to on all proper occasions, but it only arises in respect to *decisions directly upon the points in issue.*

"The language of Chief Justice Marshall, in *Cohen* v. *Virginia,* 6 Wheat., 264, 399, may profitably again be quoted: 'It is a maxim not to be disregarded, that *general expressions,* in every opinion, are to be taken *in connection with the case* in which those expressions are used. If they *go beyond the case,* they may be respected, but *ought not to control* the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. *Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.*"

2. The opinion, throughout, makes not so much as an intimation, of any intention to depart from the long line of authorities which have been cited, or of the fact

that there were any authorities at variance with the language in the opinion; or of any intention to state any principle, or rule, that was new.

The learned Chief Justice, who wrote the opinion, made no reference to the unbroken line of authorities in Illinois. Mr. Justice Blatchford concurred in the opinion, making no reference to the unbroken line of authorities in New York. Mr. Justice Gray, who, as Chief Justice of the Massachusetts Supreme Court, had written the opinion in *Morse* v. *Hutchins* above quoted, concurred, and made no reference to the unbroken line of authorities in Massachusetts.

So that it is quite inconceivable, that either the learned Chief Justice, or either of those Associate Justices, or any other member of the Court, could have had any intention of departing from the old established landmarks, in this branch of the law.

There are, no doubt, many cases, to which the rule can have no application. Such were the cases cited by the learned Chief Justice in the opinion.

One was a case where the plaintiff was not a purchaser of the entire property, as to which the false representations were made, but had acquired only a fractional interest in a speculative venture, on a false representation as to the price which the seller had originally paid for the entire property. Another case held, merely that the plaintiff could not recover "purely speculative benefits." Another was the case of misrepresentations as to the value of land, on which the plaintiff had made a loan; and his damages were limited to the loss on his loan. Another held, that a party, who was induced by fraud to enter a firm, and pay certain firm notes, could recover only the amounts he was compelled to pay.

Stated more in detail, those cases are as follows:

Crater v. *Binninger*, 33 N. J. Law, 513, decided only that there was error in the charge in that case, and that the established rule was not applicable to the facts of that case.

In *Crater* v. *Binninger,* the plaintiff was induced to enter into an oil land speculation by the representation of the defendant that the land cost $28,000. $4,000 was required for a working capital, and the defendant purchased an eighth for $4,000. He afterwards paid an assessment of $500 for the purpose of furnishing additional capital. A portion of the property was sold for $16,000. The actual cost of the property to the defendant was $18,000. The Court below ruled that the plaintiff was entitled to recover the difference between his investment ($4,500) and the actual cost of the same to the defendant ($2,000) viz., $2,500 *without taking into account the value of the land remaining unsold.* The defendant contended that the measure of damages was one-eighth of the real difference between the "cost" and the represented cost (not including the $500); and on appeal it was decided that the damages arising from a false representation are not necessarily limited to the difference between the actual value and the represented value in all cases. In the opinion of the Chancellor, on page 522, it is stated that the difference between the actual value and the represented value is in many cases the measure of damages; and *Stiles* v. *White,* 11 Met., 356, and *Cary* v. *Gruman,* 4 Hill, 627, are cited by the Court with approval. In each of the two last named cases the measure of damages was held to be the difference between the actual value and the value as represented. In *Crater* v. *Binninger* the Court lays stress upon the fact that the plaintiff was *not a purchaser of the property,* but was induced by the representation in question to embark in a speculative enterprise, which would naturally result in further investment and loss.

Fitzsimmons v. *Chapman,* 37 Michigan, 139, decided only that "damages are not recoverable for the loss of *purely speculative benefits* that cannot be estimated by any certain standard."

Here, again, we come upon a real point, on which the Chief Justice was really laying stress, that of possible prospective profits.

That the Michigan Supreme Court did not intend in that case to depart from the established rule in actions of deceit is clear from the fact that in the same volume of its reports we find the following statement of the rule by Judge COOLEY in the case of *Page* v. *Wells*, 37 Mich., 415: "If the plaintiff was induced to purchase lands on representations which proved to be untrue, the measure of his loss, as it seems to us, would be perfectly plain, and would be reached by an answer to the following question: *How much less is the land worth as it is, than it would have been if its condition and quality had been as represented? This is the only safe and only reasonable rule.*"

Horne v. *Walton*, 117 Illinois, 130, was a case where the rule was clearly inapplicable, as the misrepresentation was as to the value of land on which the plaintiff had made a loan. The property was properly limit d to the amount lost on the loan. The plaintiff was not a purchaser of the land. The Court in that case, at page 134, expressly recognize the soundness of the established rule. But they say, "this instruction was properly refused, as being *inapplicable to the facts of the case.* Where there has been a *sale* of land, and fraudulent representations have been made as to its value or quality or condition, the measure of damages is, *undoubtedly,* the *difference* between the *actual value of* the land and the *value* of *it,* as it was *represented* to be at the time of the sale. In this case there was *no sale,* but a *loan.*"

When examined more closely it will be seen that the rule there laid down is really the same which we are contending for. In other words, what a lender of money intends is the certanty of getting back his money, that is security for his loan. He can never get more than the amount of his loan. From that fact alone, the represented value of that which he receives is fixed. In this respect, the position of the purchaser of lands is

quite different, because he is entitled to the land's entire value. But the measure of damages in an action of deceit is the same in both cases. This is brought out clearly in the opinion of Judge COOLEY in a precisely similar case, the case of a loan on inadequate security, induced by fraudulent representations as to the value of the security. The damages were held to be the difference between the loan and the actual value of the security.

Briggs v. *Brushaber*, 43 Mich., 330.

Judge COOLEY there says: "In this case the plaintiff was damnified as soon as the loan was made. She had been induced to part with her money for something of much less value than that which it was agreed she should receive for it. The mortgage was marketable commodity, and she lost by the fraud itself the *difference* between the market *value* of that which she *received* and that *which she was to have under the arrangement.*"

Schwabacher v. *Riddle*, 84 Illinois, 517, merely holds, that one who has been induced by fraud to become a member of a firm, and is thereafter compelled to pay a portion of certain firm notes, can recover only the damage resulting from the fraud. No other point was raised, or decided. That, too, was not the case of a purchase of property. The Court say: "So much of the loss as was sustained in consequence of the misplaced confidence in Fosbender's solvency alone, is most clearly not chargeable to the other parties. If appellee is entitled to recover, it is for the injury done him by the defendants, and not for injuries sustained in consequence of circumstances over which they had no control."

Slingerland v. *Bennett*, 66 N. Y., 611, decided only that in any action for breach of warranty as to the responsibility of the maker of a note given to plaintiff on a sale of a horse, the plaintiff could not recover the costs of a judgment on the note, but only the amount

of the note with interest. Not so much as an allusion is made to the established rule on sales.

It is apparent, therefore, that not one of the authorities cited by the Chief Justice questions the established rule, that several of them expressly assert it, and that they all go virtually on some other question, of what was or was not damage resulting from the fraud in that particular case.

3. The decision in *Smith* v. *Bolles*, rightly interpreted, must be held to be a decision, only that the measure of damages is not the difference between the represented value and the contract price.

At the same time, the opinion states the established law, that there is no right, in such a case, to recover remote possible prospective profits.

The position taken by the plaintiff in error in that case, as appears from his brief in the record, was as follows:

The Court charged the jury that the measure of recovery is generally the difference between 'the *contract price* and the *reasonable market value*.' We submit that this is not the rule. * * * To test the effect of the rule given, take an example. Suppose testimony had been given tending to show that this stock was worth $5 a share, and that it would have been worth $10 a share had it met the representation of the defendant. The measure of damages then would have been $5 a share. And yet the Court said to the jury that the damages were practically $8.50 a share in the case supposed—the difference between the *contract price $1.50 and the reasonable market value if the property had been as represented*, namely $10 a share."

The opinion of the Court must be read in connection with the contention just stated.

The opinion reads as follows:

"The bill of exceptions states that the Court charged the jury 'as to the law by which the jury were to be governed in the assessment of damages under the issues made in the case,' that 'the measure of recovery is generally the difference between the *contract price* and the reasonable market value, if the property had been as represented to be, or in case the property or stock is entirely worthless, then its value is what it would have been worth if it had been in the evidence before you.'

"In this there was error. The measure of damages was *not* the *difference* between the *contract price* and the reasonable *market value* if the property had been *as represented* to be, even if the stock had been worth the price paid for it; nor if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff *might have gained is not the question*, but what he had *lost* by being *deceived* into the purchase. The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representations, and so as to the other persons on whose claims the palintiff sought to recover. If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged, and that the purchase of stock had been made in reliance thereon, then the defendant was liable to respond in such damages as *naturally and proximately resulted from the fraud.* He was bound to *make good the loss sustained,* such as the moneys the plaintiff had paid out, and interest, and any other outlay *legitimately attributable* to defendant's *fraudulent conduct;* but this liability did *not* include the *expected fruits of an unrealized speculation.* The reasonable *market value,* if the property had been as represented, afforded, *therefore,* no proper element of recovery.

"*Nor* had the *contract price* the bearing given to it by the Court. What the plaintiff *paid* for the stock *was properly put in evidence, not* as the *basis* of the *application of the rule* in relation to the difference between the contract price and the market or actual value, but as establishing the *loss* he had *sustained* in that particular. If the stock had a *value in fact,* that *would necessarily* be applied in *reduction* of the *damages.* 'The damage to be recovered must always be the *natural and proximate consequence of the act* complained of,' says Mr. Greenleaf, Vol. II., § 256; and 'That test is,' adds Chief Justice Beasley in Crater *v.* Binninger, 33 N. J. L., 513, 'that those results are *proximate* which the wrong-doer from his position must have contemplated as the *probable consequences of his fraud* or breach of contract.'"

It is plain, therefore, that the Court intended to decide the case on the principles here stated as the foundation of the rule.

The rule stated in the Court below did give to the plaintiff the "expected fruits of an unrealized speculation." Therein it differed from the established rule. The established rule works out the opposite result, the one which should be worked out, according to the principle stated by this Court in *Smith* v. *Bolles.*

We do not contend, that the "*market* value" is one of the elements in estimating the damage resulting from a proved deceit. Our contention is, that the element is the *actual* value. The market value is, no doubt, often the easiest way of proving actual value. But there are many cases, where there is no such thing as "market value." In every case of deceit, however, the main element in the computation of damage is "actual" value. So it is stated by Lord Cotton, in *Peek* v. *Derry,* as stated on our opponent's brief (p. 9).

The fact is, that our opponents have not correctly apprehended our position. The position for which we contend is, that the measure of damage is the difference between represented value and "actual" value.

V.—No argument of weight can rightly be drawn from the fact, that some of our courts, especially the Federal Courts, have followed *Smith* v. *Bolles* since the decision was promulgated. That result was to be expected. Those cases, we respectfully submit, can have no weight as authority, for the reason that they have themselves been mere submissions to authority.

Even with those decisions against us, however, we ask the Court to make a comparison, as to weight of authority, between the list of cases which we present in support of the established rule, and those that our able and diligent adversaries have been able to discover, in opposition to it.

But we do most strenuously insist, that, under the present resulting situation, this Court should now give its decisive authority in support of the rule which was formerly free from any substantial controversy, the only rule which can be sustained on principle, on sound reason, and thus put an end to all doubts and discrepancies in this branch of the law.

VI—The rule of damages, then, being assumed to be the difference, between the value of the property in fact and its value as represented, as of the date of the purchase, we respectfully submit, that the only practicable means of enabling a jury to estimate that difference in value is by the opinions of experts.

Transportation Line v. *Hope*, 95 U. S., 297, 298.

St. Louis Co. v. *Edwards*, 78 Fed. Rep., 745.

Swan v. County of Middlesex, 101 Mass., 173. Opinion by Mr. Justice Gray.

In fact, this was the character of some of the evidence put in by the defence at fols. 1274-1277.

In addition to this evidence, however, the jury had before them all the facts offered by both parties, as to the dimensions of the ore body, the quantity and quality of the ore in the mine, and the subsequent product of the mine.

Especially, not one word of testimony was excluded as to value, which was offered by the defendant.

Swan v. *County of Middlesex,* 101 Mass., at p. 177, states the principle as follows:

GRAY, J.: "It is well settled in this Commonwealth that, when the value of real estate is in controversy, opinions of persons acquainted with its value are admissible in evidence. Those opinions are admitted, not as being the opinions of experts, strictly so called, for they are not founded on special study or training or professional experience; but rather from necessity, upon the ground that they depend upon knowledge which anyone may acquire, but which the jury may not have, and that they are the most satisfactory, and often the only attainable, evidence of the fact to be proved. *Dwight* v. *County Commissioners,* 11 Cush., 203. *Shattuck* v. *Stoneham Branch Railroad Co.,* 6 Allen, 116, 117. *Whitman* v. *Boston & Maine Railroad,* 7 Allen, 316, and cases there cited. The same rule has prevailed in courts of authority in other States. *Kellogg* v. *Krauser,* 14 S. & R., 137. *Warren* v. *Wheeler,* 21 Maine, 484. *Clark* v. *Baird,* 5 Selden, 183. The knowledge requisite to qualify a witness to testify to his opinion of the value of lands may either be acquired by the performance of official duty, as by a county commissioner or selectman, whose duty it is to lay out public ways, or by an assessor, whose duty it is to ascertain the value of lands for the purpose of taxation; or it may be derived from knowledge of sales and purchases of other lands in the vicinity, either by the witness himself or by other

persons. *Dickenson* v. *Fitchburg,* 13 Gray, 546. *Whitman* v. *Boston & Maine Railroad,* 7 Allen, 316. *Russell* v. *Horn Pond Branch Railroad Co.,* 4 Gray, 607. *Fowler* v. *County Commissioners,* 6 Allen, 97. On the question of the sufficiency of the knowledge of the witness, much must be left to the discretion of the judge or officer presiding at the trial. *Paine* v. *Boston,* 4 Allen, 170. *Shattuck* v. *Stoneham Branch Railroad Co.,* 6 Allen, 117. When the matter in issue is the assessment of damages to land by the laying out of a public way, witnesses having the requisite knowledge may testify to their opinion of the comparative value of the lands immediately before and after the taking, and to the effect of the taking upon the value of the remaining land, by way of injury or benefit. *Dwight* v. *County Commissioners,* 11 Cush., 201. *Shaw* v. *Charlestown,* 2 Gray, 107. *West Newbury v. Chase,* 5 Gray, 421. *Dickenson* v. *Fitchburg,* 13 Gray, 546. *Shattuck* v. *Stoneham Branch Railroad Co.,* 6 Allen, 116, 117."

VII.—The opinions of experts, then, being the only practicable means of enabling a jury to estimate that difference in value, we next submit, that those opinions, in order to preserve to the jury its full function, can be best given in the form of answers to hypothetical questions—if, indeed, it is permissible to give them in any other form.

People v. *Lake,* 12 N. Y., 358.
Seymour v. *Fellows,* 77 N. Y., 178.
Dilleber v. *Home Ins. Co.,* 87 N. Y., 79.
Cole v. *Fall Brook Co.,* 159 N. Y., 59, 68.
Cowley v. *People,* 83 N. Y., 464.

Cowley v. *People,* 83 N. Y., 464, lays down the rule as to hypothetical questions, in these words, p. 470: "Another question is as to the admissibility of the hypo-

thetical questions put to medical experts sworn as witnesses. The claim is that a hypothetical question may not be put to an expert unless it states the facts *as they exist*. It is manifest, if this is the rule, that in a trial where there is a dispute as to the facts, which can be settled only by the jury, there would be no room for a hypothetical question. The meaning of the word is, that it supposes, assumes something for the time being. Each side, in an issue of fact, has its theory of what is the true state of the facts, and assumes that it can prove it to be so to the satisfaction of the jury; and so assuming, shapes hypothetical questions to experts accordingly. And such is the correct practice."

VIII.—Upon these positions, we submit that the rulings of the trial Court as to the admission of evidence, were manifestly correct.

1. It being the law, that the opinions of experts must be given, in the form of answers to hypothetical questions, we submit, that there was no error in the rulings of the trial Court on that class of testiomony.

The errors alleged by the defense on this point mainly concern the testimony of Olcott. The answers to the positions of the plaintiff in error as to this testimony are as follows:

(*a.*) The decision as to the qualifications of an alleged expert, and on most other questions as to the testimony of experts, is a matter of discretion for the Court, and a mistake in such a decision does not constitute error.

***Stillwell Man. Co.* v. *Phelps*, 130 U. S., 520, 527.**

***Montana Railway Co.* v. *Warren*, 137 U. S., 348, 353.**

(*b.*) Hypothetical questions may assume any facts which the testimony has a "tendency" to support.

Cowley v. *People*, 83 N. Y., 464.
Stearns v. *Field*, 90 N. Y., 640.
Louisville Co. v. *Falvey*, 104 Indiana, 409, 413.
Dickinson v. *Fitchburg*, 13 Gray, 546, 556.

(*c.*) The testimony of the plaintiffs' experts conformed with complete accuracy to the Burnham report, and to the other facts proved by the evidence.

Opinion Court of Appeals, pp. 624-627.

(*d.*) The testimony of Olcott in the main amounted to nothing but mathematical computations.

Testimony Olcott, pp. 240-245.

(*e.*) The decision on the form of a hypothetical question must be largely left to the discretion of the trial Court.

Forsythe v. *Doolittle*, 120 U. S., 73, 78.

(*f.*) The points now urged by the defense are largely afterthoughts which were never fairly presented to the trial Court.

Opinion Court of Appeals, pp. 624-626.

2. The letters of Egan, written in confidence to his friends and associates, were admissible on the question of his intent, as tending to show whether he was the deceived or the deceiver.

The defense below was driven to the contention, that the deceit in the case was by Egan. The fact, that there had been a most remarkable and successful fraud by the defendant, was conceded in open Court by the learned counsel for defendant.

Opinion of Court of Appeals, p. 626.
Cross-examination of defendant, fols. 1011-1022.

The Egan letters, written from the mine, in confidence to his friends, while his examination was in progress, if admissible on no other grounds, were clearly admissible to prove Egan's state of mind.

The portions of the charge under which the letters were offered, to which no exception was taken, are at folios 1372-1374, and are as follows:

"It is not necessary for me to say that you must find affirmatively *that Egan was deceived*, at the very threshold of your consideration of the case. If he was not, that is the end of the case. If Egan deceived himself, or if Egan misrepresented the facts of his own volition, the defendant is not responsible, and never mind how much the plaintiffs may have been misled they have no cause of action. And now, was Egan misled?" * * *

"You may find that Egan started to the mine for the purpose of buying it; or that when he reached it and saw it he conceived the idea that it was the basis of a great speculation, out of which he could make money for himself. You may find, in view of some of the *letters that were written by him, almost at the threshold of his examination*, that he did not care very much whether the facts which had been stated in the Burnham report were true or not. You may find that he was thrown off his guard by the artifices which the defendant and Cheatham resorted to, and that he was led to believe what was stated to be true in the Burnham report and the report which he made himself. Now, this is a question for you to determine. Was he cheated or was he the cheat?"

We refer to the following authorities:

As to the admissibility of Egan's confidential contemporaneous communications to Platt and Morse, in the nature of informal preliminary reports, on the issue of his intent in making his later formal report;

Shrewsbury v. *Blount*, 2 Manning & Granger, 475,

in which on an action for deceit, the Court admitted in favor of the defendants their own contemporaneous conversations with one another on the question of their intent.

Greenleaf on Evidence, §108.
Beaver v. *Taylor*, 1 Wallace, 637.
Travelers' Ins. Co. v. *Mosley*, 8 Wallace, 397.
Mutual Life Ins. Co. v. *Hillmon*, 145 U. S., 285.
Russell v. *Frisbie*, 19 Conn., 205.

IX.—The objection that the plaintiffs could not recover the entire damage is quite without merit.

Opinion Court of Appeals, p. 623.

Whether under the New York Code or not, the plaintiffs were the only parties to the transaction with the defendant. They paid the entire consideration. The rights of other parties, not present on this record, are quite immaterial.

Plaintiffs' Exhibits 1-11, fols. 1474-1575.
Treat v. *Stanton*, 14 Connecticut, 445.
Western R. Co. v. *Nolan*, 48 N. Y., 513.

X.—Upon these positions, we submit, that the charge of the trial Court was the only one which would work justice to both parties, in any case like the case at bar.

1. It is well settled, that the charge of the Court need not follow the exact form requested by counsel; and there is no error, if the charge is correct in substance.

***White* v. *Van Horn*, 159 U. S., 3.**
***Erie Railroad Co.* v. *Winter*, 143 U. S., 60.**

2. The charge of the Court granted all that was correctly stated in the defendant's request.

That request read as follows (fol. 1357): "If the jury find for the plaintiffs, they can only find as damages the direct pecuniary loss, if any, the plaintiffs suffered by reason of the false and fraudulent representations and acts of the defendant; and *the value of the mine, if the same had been as represented, affords no proper element of recovery.* The value of the mine when the plaintiffs bought it, must be applied in reducing or extinguishing the plaintiffs' loss."

It is to be noted, that every single proposition in this request was really charged, excepting the one in italics, that "the value of the mine, *if the same had been as represented,* affords no proper element of recovery." The loss to be recovered, under the charge of the Court, was carefully limited to the loss actually resulting from the fraudulent acts and representations actually proved against the defendant. The defendant, under the charge as given, had a credit for the "value of the mine when the plaintiffs bought it."

We have then this singular position. The only clause in the request which was not granted, would have virtually directed the jury to leave wholly out of consideration the effect on the valuation of the purchased property, which was due to the defendant's fraud.

It would be difficult to devise a more complete demonstration, of the unsoundness of the contention of the defense. Their entire contention rests on the erroneous assumption, that the remedy in deceit is the same as that in rescission. We most respectfully repeat, that there is the cause of the entire difficulty, and that a momentary overlooking of that distinction was the source of the phrases in the opinion of *Smith* v. *Bolles,* which are inapplicable to the case at bar.

3. The impossibility, under any rule other than the one charged, of limiting the estimate of damage to such damage as actually resulted from the acts found by the

jury, is apparent from the following extract from the charge (Record, fols. 1376-1382):

"I shall content myself with directing your attention to some of the principal matters in respect to which it is said he was deceived.

"In the first place, it is said that he was deceived as to the *average width* of the pay streak, and that this was affected in part by the way the mine had been manipulated. It is said that he was deceived in respect to abandoned workings, and if he had discovered them, or they had been revealed, he would not have been induced to recommend the mine. It is said that he was deceived *in regard to the amount of ore which had been produced,* and the *value of the ore in the past history* of the mine. It is said that he was deceived as to the *true value* of the ore by a fraudulent mill run practiced upon him. And there are *other matters* in regard to which it is alleged he was deceived, outside of those which I may term the general geological conditions. Now, you will take up the *evidence as to these various issues,* consider them *one by one,* and determine whether *as to that one* there was *misrepresentation or* there was a *fraud* of any kind for which the defendant is responsible. Now, if Egan was deceived in some respects, but not in others, the question will arise to what extent the defendant is responsible to the plaintiffs, bearing in mind the proposition which I have stated before, that the *defendant is not responsible for any misrepresentations made by Egan to the plaintiffs, except those which he authorized or of which he was the author.*

"If you find that Egan was deceived, and that, in consequence of the deceits practiced upon him, the plaintiffs were induced to make this purchase, that *they were misled by the things which misled him,* then you reach the question of damages.

"The measure of damages in actions of this nature is the difference between the value of the property as it proved to be and as it would have been as represented.

You may find that the plaintiffs were influenced by one or more and not by all of the representations, and to the *extent* that the plaintiffs have been *injured by one* of several misrepresentations, they are entitled to recover *for that;* that is, if you find the various issues of fact which I have left for your consideration in favor of the plaintiffs.

"Now, *upon what particular facts stated in the Burnham report, or in the report made by Egan himself, did the plaintiffs rely?* Which of those *has been proved to be a misstatement for which the defendant is responsible?* You can consider the statements *separately or collectively.* If you find that they relied upon *all* of them and would not have been induced to enter into the contract except for their belief *in the truth of all of them,* then you can say, if you find that they are entitled to recover, that they should recover the difference between the value of the property as it would have been if *all those representations had been true* and as it proved to be. *On the other hand,* if you say that they did *not rely upon all* these representations, that it was *this one* or *that one* which may have been *influential,* then you are to determine how much the property would have been worth *if that particular representation had been true.* If that particular fact had existed as represented, and then the measure of damages would be the difference between *that value* and the *value* of the property *as it proved.*"

XI.—The question certified by the Court of Appeals should be answered in conformity with the positions here advanced, and, if this Court takes any further action, there should be a judgment of affirmance of the judgment below.

Respectfully submitted,

ALBERT STICKNEY,

Of counsel for defendants in error.